Supreme Court, U.S.
FILED

971910 MAY 26 1998

OFFICE OF THE CLERK

No. _____

In The

# Supreme Court of the United States

October Term, 1997

MARILYN ZIEMKE, CELIA SHAR, and
ISRAEL TRAVEL ADVISORY SERVICE, INC.,

*Petitioners,*

v.

SHALOM ALMOG, IRIT ALMOG,
and BEN AMI GELLER,

*Respondents.*

**On Petition For A Writ Of Certiorari
To The Superior Court Of New Jersey,
Appellate Division**

## PETITION FOR A WRIT OF CERTIORARI

CHRISTOPHER V. LANGONE
*Counsel of Record*
LANGONE & HODES
One East Wacker, Suite 2420
Chicago, IL 60601
(312) 464-7200
*Attorney for Petitioners*

53 pp

## QUESTIONS PRESENTED FOR REVIEW

I. Can a State make the deterrence of defamatory speech an overriding government interest without running afoul of the free speech guarantee of the First Amendment?

1-A. Can a New Jersey court, consistent with the First Amendment, impose millions of dollars in punitive damages on two of its individual citizens, resulting in a loss of their home, business, life savings, and all of their assets, because of defamatory speech uttered by them?

1-B. If New Jersey has a legitimate government interest in deterring defamatory speech, is that deterrence interest so strong that it outweighs the interest of a foreign country in determining how its citizens should be compensated?

II. Does the Due Process Clause of the Fourteenth Amendment prohibit a State from imposing a multi-million dollar punitive damage verdict rendered by an "advisory" jury when that verdict was "elevated" on appeal without having been subject to any review at either the trial or appellate level, and when the jury did not consider each Defendant individually when rendering its punitive verdicts?

III. Is a 5.5 million dollar punitive damage verdict imposed against two individual women, whose combined assets total 3 million dollars, excessive in violation of the Due Process Clause of the Fourteenth Amendment?

## PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, Israel Rodrigue, a citizen of the State of Israel, and Abir Travel and Tours, Ltd., a corporation organized and existing under the laws of the State of Israel, were parties to the original proceeding in the trial court. Both were defaulted and no action was ever taken against them by either plaintiff or the cross-claimant.

There are no parent or subsidiary companies to be listed.

## TABLE OF CONTENTS

**Questions Presented for Review** ..... i

**Parties to the Proceedings** ..... ii

**Table of Authorities** ..... v

**Opinions Below** ..... 1

**Jurisdiction** ..... 1

**Constitutional Provisions Involved** ..... 2

**Statement of the Case** ..... 3

**Reasons for Granting the Writ** ..... 7

I. *DETERRING SPEECH IS NOT A LEGITIMATE STATE INTEREST AND IS CERTAINLY NOT THE OVERRIDING STATE INTEREST IN A DEFAMATION CASE.* ..... 7

A. Punitive Damages in Defamation Cases Violate The First Amendment And, Therefore, Are Unconstitutional ..... 10

B. In Holding that Deterrence of Speech Outweighed Compensating Damage to Reputation the Superior Court Ignored *Gertz* and Compromised First Amendment Protection ..... 14

II. *DEFENDANTS' PROCEDURAL DUE PROCESS RIGHTS WERE VIOLATED WHEN A MULTI-MILLION DOLLAR PUNITIVE VERDICT WAS IMPOSED THROUGH A BIZARRE "ADVISORY" JURY VERDICT PROCEDURE UNKNOWN TO THE COMMON LAW, AND NO JUDICIAL REVIEW WAS PROVIDED* ..... 16

A. The Jury Was Misinstructed In That It Did Not Make Individual Determinations of Guilt ..... 19

B. Defendants Were Deprived of Review at the Trial Level on Account of the Trial Judge's Inattentiveness During Trial And Inability to "Reflect in the Record" His Findings ..... 21

C. Defendants Were Deprived Of Appellate Review By Virtue of the Unprecedented Use of the "Advisory" Jury Procedure ..... 22

III. *DEFENDANTS' SUBSTANTIVE DUE PROCESS RIGHTS WERE VIOLATED* ..... 24

A. Degree of Reprehensibility ..... 26

B. Ratio ..... 28

C. Comparative Legislative Sanctions ..... 29

**Conclusion** ..... 30

**Appendix** .....App. 1 to App. 43

## TABLE OF AUTHORITIES

*Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996) ..... 27

*Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 818 (1986) .. 10

*Almog v. Israel Travel Advisory Service, Inc.*,
704 A.2d 1297 (N.J. 1998). ..... 23

*Almog v. Israeli Travel Advisory Service, Inc.*,
689 A.2d 158 (N.J. Super. Ct.
App. Div. 1997) ..... 9, 15, 18, 21, 23, 24

*Anderson v. Sills*, 363 A.2d 381 (1976) ..... 23

*Ashland v. Ling-Temco-Vought, Inc.*,
711 F.2d 1431 (9th Cir. 1983) ..... 23

*BMW of North America v. Gore*,
116 S.Ct. 1589 (1996) ..... 17, 25-32

*Brantley v. Zantop International Airlines, Inc.*,
617 F.Supp. 1032 (E.D.Mich. 1985) .....12

*Brown & Williamson Tobacco Corp. v. Jacobson*,
827 F.2d 1119 (7th Cir. 1987) .....7

*Cohen v. Cruz*, __ U.S. __, 118 S. Ct. 1212 (1998) ..... 8

*Deemer v. Silk City Textile Machinery Co.*,
193 N.J. Super 643 (App. Div. 1984) ..... 15

*Dun & Bradstreet v. Greenmoss Builders*,
472 U.S. 749 (1985) . ..... 11, 12, 16, 25

*Filariga v. Pena-Irala*,
577 F. Supp. 860 (E.D. NY. 1984) ..... 26

*Gantes v. Kason Corp.*, 679 A.2d 106 (N.J. 1996) ..... 9

*Gertz v. Welch, Inc.*, 418 U.S. 323 (1974) .. 9, 11, 15, 19, 25

*Honda Motor Co., Ltd., v. Oberg*,
512 U.S. 415 (1994) ..... 17-19, 24

*J.S. and M.S. v. R.T.H*, 693 A.2d 1191 (N.J. App. 1997) . 27

*Lewis v. Elliot*, 628 F. Supp. 512 (D.D.C. 1986) ..... 29

*McHale v. Lake Charles American Press*,
390 So. 2d 556 (La. App. 1980) ..... 12

*Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974) ..... 16

*New York Times v. Sullivan*, 376 U.S. 254 (1964) ..... 14

*North Ga. Finishing, Inc. v. Di-Chem Inc.*,
419 U.S. 601 (1975) ..... 16

*Pacific Mutual Life Insurance Co. v. Haslip*,
499 U.S. 1 (1991) ..... 11, 17, 18, 19, 21, 28

*Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973) ..... 9

*Refuse & Env. Systems v. Indus. Serv. of America*,
932 F.2d 37 (1st Cir. 1991) ..... 20

*Rosenbloom v. Metromedia*, 403 U.S. 29 (1971) ..... 10

*Shuping v. Barber*, 89 N.C. App. 242,
365 S.E.2d 712 ..... 20

*Speiser v. Randall*, 357 U.S. 513 (1958) ..... 14

*Sprouse v. Clay Communications*,
211 S.E.2d 674 (W. Va. 1975) .....12

*Stone v. Essex County Newspaper, Inc.*,
330 N.E.2d 161 (Mass. 1975) ..... 11

*Tasket v. King Broadcasting*, 546 P.2d 81 (Wash. 1976) . 11

*TXO v. Alliance Resources Corp.*,
509 U.S. 443 (1993) ..... 24, 25-30

*Wheeler v. Green*, 593 P.2d 777 (Or. 1979) ..... 11

*Wilson v. Savino*, 89 A.2d 399 (N.J. 1952) ..... 20

*Xuncax, et. al v. Gramajo*, 886 F. Supp. 162 ..... 27

**STATUTES**

N.J. STAT. ANN. § 2A:15-5.13(e) (West 1998) .....19, 30

**OTHER**

*Am. Jur.* 2d., LIBEL AND SLANDER, § 348 .....20

Comment, *Punitive Damages and Defamation Litigation: A Clear And Present Danger to Free Speech*,
64 Yale L.J. 610 (1955) .....10

Comment, *The Constitutionality of Punitive Damages in Libel Actions*, 45 Ford. L. Rev. 1382 (1977). . . . . .10

*New Jersey Law Journal*, *N.J.L.J.*, Sept. 27, 1993, p. 3 . . . . .7

Robert D. Sack, LIBEL, SLANDER AND RELATED PROBLEMS . . . . . 13
(1995 Supp.). . . . . 7-8

9 C. Wright & A. Miller, *Federal Practice and Procedures* § 2335 (1971) . . . . . .23

## OPINIONS BELOW

The opinion of the New Jersey Superior Court, Appellate Division, is published at 298 N.J. Super. 145, 689 A.2d 158 (N.J. Super. Ct. App. Div. 1997). The New Jersey Supreme Court's order granting Defendants' petition for a writ of certiorari is not published. The New Jersey Supreme Court's order holding that certiorari was improvidently granted and dismissing the appeal is published at 152 N.J. 361, 704 A.2d 1297 (1998). The New Jersey Supreme Court's order denying reconsideration is not published. The opinions and orders entered by the trial court are not published. All relevant opinions and orders are included in the attached Appendix.

## JURISDICTION

After a jury trial, judgment for over $2,000,000 was entered on October 8, 1993, (App. 37- 43), pursuant to a bench verdict rendered by the trial judge. The jury's $7,000,000 verdict was denominated "advisory." (App. 18-21.) A timely filed new trial motion was denied. (App. 22-23.)

On appeal, on February 25, 1997, the Superior Court of New Jersey, Appellate Division, vacated the bench verdict and "elevated" the seven-million dollar "advisory" jury verdict to the final judgment in the case. (App. 1-17.) An amended judgment was entered in conformance with this opinion on March 11, 1997. (App. 30-36.)

Defendants timely sought a writ of certiorari from the New Jersey Supreme Court, which was granted. (App. 24-25.) On January 21, 1998, the New Jersey Supreme Court, after full briefing and oral argument, dismissed Defendants' appeal, determining that certiorari was improvidently granted. (App.26-27.) The New Jersey Supreme Court denied Defendants' timely filed motion to reconsider on February 24,

1998. (App. 28-29.) This Petition has been timely filed, within 90 days of February 24, 1998. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved in this petition are the Free Speech Clause of the First Amendment and the Due Process Clause of Section 1 of the Fourteenth Amendment.

The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

Section 1 of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. § XIV, § 1.

## STATEMENT OF THE CASE [1]

Plaintiffs, Shalom Almog ("Almog"), his wife, Irit Almog ("Ms. Almog"), and Cross-claimant, Ben Ami Geller ("Geller"), are all Israeli citizens residing in Israel. They filed suit in Essex County alleging various claims against Ms. Celia Shar ("Ms. Shar") and Ms. Marilyn Ziemke ("Ms. Ziemke"), a mother and daughter, now ages 82 and 65, respectively, who operate a small travel agency, Israel Travel Advisory Service, Inc. ("ITAS"), out of their home in Livingston, New Jersey.

Almog used to work, in Israel, for various Israeli land tour operators that made ground arrangements in Israel for ITAS tourists. Geller was an Israeli tour guide for ITAS.

In October, 1988, Geller traveled from Israel to New Jersey to meet with Shar and Ziemke to report a very serious matter: Almog was embezzling money from ITAS. Geller substantiated this claim with documentation. (Tr. 8/9/93 at 118-119.) After hearing this news, Ms. Shar and Ms. Ziemke consulted with an Israeli attorney about filing a lawsuit in Israel against Almog to recover the stolen funds. (Tr. 8/4/93 at 42.) Before filing the lawsuit, however, Israeli law required substantiation from an independent accountant. As alleged in the Israeli Complaint filed by Defendants in Israel, the accounting firm confirmed that Almog had misappropriated large sums of money from ITAS. (Da 49-58.)

---

[1] For the purposes of this Petition, citations to the record below will be in the following form: "DA #" refers to a page in the Defendants' Appendix filed in the Superior Court; "Tr. #" refers to a page of the transcript of the proceedings; "PX #" refers to a Plaintiff's trial exhibit; and "DX #" refers to a Defendants' trial exhibit. Citations to a page of the Appendix attached to this Petition will be in the form "App. #."

When Almog learned of ITAS' investigation by the Israeli accountant and ITAS' intention to sue him in Israel, he preemptively filed this lawsuit. (Da 1-48.) The suit was filed in New Jersey because, as Plaintiffs' attorney stated at trial, the Almogs "don't have a cause of action for defamation in Israel, and they do in the United States." (Tr. 7/14/93 at 18.) Almog claimed that Defendants defamed him by telling approximately 17 people in the tourist industry (14 of whom were located in Israel) of Almog's embezzlement. (Da 1-48.) While Ms. Almog did not claim she was defamed, she sought damages for loss of consortium because she was separated from her husband when he relocated to the Caribbean to manage a gold jewelry factory. (*Id.*; 7/19/93 at 135-136.) The Almogs also sued Geller for defamation because he initially told Ms. Shar and Ms. Ziemke about Mr. Almog's theft of ITAS' funds. After Geller gave trial testimony favorable to the Almogs, however, all claims against him were dismissed. (Tr. 8/13/93 at 90.)

Geller also cross-claimed against Defendants for defamation, making him Almog's ally. Geller's primary claim was that Defendants defamed him by sending financial documents to the Israeli tax authority, most of which were sent at the Israeli agency's request. (Tr. 8/9/93 at 69; 8/13/93 at 61.) Geller never disputed that the information sent was true, (Tr. 8/13/93 at 61); in fact, Geller admitted that after the investigation, he paid a "cofer" of 50,000 shekels (US $25,000) to the tax authority. At trial, he mischaracterized this payment as a "bail bond." (Tr. 8/11/93 at 46-48.) In truth, this payment was a civil fine in Israel that was paid to avoid criminal indictment. (Da. 1130-1135.)

As noted by the Superior Court of New Jersey, Appellate Division, the trial was rife with procedural "anomalies," the most significant of which was the unprecedented manner in which an "advisory" jury was used. The trial judge had initially

decided that the case would be decided by a jury; after the close of the evidence, however, he changed his mind and decided he would decide the case, sitting "as an Israeli judge — without a jury as with — as is the case in Israel." (Tr. 8/13/93, p.m. at 112.) He made this decision notwithstanding the fact that he had periodically announced to the jury that he was not listening to the proceedings. (*See e.g.*, Tr. 8/13/93, p.m. at 95.)

Nevertheless, he allowed the jury to deliberate in an "advisory" capacity, and ultimately used the jury's "advisory" opinion to craft his own judgment against Defendants. Then, without making any findings of fact or conclusions of law, the trial judge awarded the Almogs and Geller over $2,000,000 in compensatory damages, purportedly pursuant to Israeli law. (*Id.* at pp. 112-116.) The jury, having been instructed with portions of New Jersey law, returned with its "advisory" opinion in which it awarded the Almogs and Geller over $7,000,000 (including $5,500,000 in punitive damages) (Da 461-467 & 453-460) — more than the Defendants could ever hope to earn in their remaining lifetimes. In rendering these verdicts, however, the Defendants were not afforded individual consideration; rather, they were lumped together and treated as one unit, even in the punitive damages phase. (Da 461-467, Tr. 8/13/93, p.m. at 60-69; Tr. 9/21/93, pp. 59-62.)

Defendants urged the trial court to grant a new trial, noting, among other things, that advisory juries cannot be utilized in the fashion prescribed by the trial judge (*i.e.*, the "just in case I'm wrong use the other verdict" approach),[2] that due process

---

[2] In the words of the trial judge: "In the event I'm correct that this is an Israeli case, then the Appellate Division will have the option of deciding whether I am correct insofar as acting as an Israeli judge or whether the New Jersey jury is the one they should listen to and whose verdict they should follow" (Tr. 8/13/93 at 112.)

requires individual determinations of guilt (Point of Error 3, Da 526), and that the punitive damages awarded were excessive. (Point of Error 23, Da 598-605.)

The Almogs and Geller returned to Israel with their New Jersey judgments. Defendants appealed. On appeal, Defendants were put in the strange and untenable position of attempting to argue against two verdicts: the operative bench verdict and the non-operative "advisory" jury verdict. They pressed on appeal the arguments concerning the due process requirements of individual determinations of guilt, (Amended Brief, Appellate Division, Point V), the excessiveness of the punitive damage verdict, (Reply Brief, Appellate Division, Point II-E), and the improprieties of the use and elevation of an "advisory" jury verdict, (Amended Brief, Point III, A-3; Point II A, B, & F.) On appeal, the Superior Court of New Jersey, Appellate Division, for the first time entered the "advisory" jury verdict as the final judgment in the case. Accordingly, on March 11, 1997, in accordance with this decision, an Amended Judgment was entered pursuant to the jury's verdict. (App. 30-36.) This was the first time that the punitive damage award ever became operative.

Defendants petitioned the New Jersey Supreme Court to grant certiorari noting, among other things, that the newly "elevated" punitive damage verdict clashed with the First Amendment and violated Defendants' due process rights as articulated by this Court. (*See*, Petition For Certiorari, Points I & III and Reply Brief, Points I & II.) The Defendants also continued to press their arguments regarding individualized determinations of guilt, as well as the fact that the odd and unprecedented use of the advisory jury procedure violated their due process rights. (*Id.* at Points II & III.)

The New Jersey Supreme Court granted the petition. (App.

24-25.) Two weeks after oral argument, however, that court dismissed the appeal, deciding, without explanation, that certiorari had been "improvidently granted." (App. 26-27.) Defendants timely sought reconsideration, which was denied. (App. 27-28.)

To stay execution on assets pending appeal, the individual Defendants sought refuge in the United States Bankruptcy Court for the District of New Jersey, (case numbers 97-B-413398 and 97-B-413399), which is awaiting the response of this Court before acting further. If this Court denies this petition, the impact on Defendants will be disastrous: Defendants will lose all of their assets, including their home, their life savings and their income in retirement. They will be penniless and destitute and will be forever encumbered by the grossly excessive 5.5 million dollar punitive damage verdict.

## REASONS FOR GRANTING THE WRIT

### I DETERRING SPEECH IS NOT A LEGITIMATE STATE INTEREST AND IS CERTAINLY NOT THE OVERRIDING STATE INTEREST IN A DEFAMATION CASE.

This case involves what the *New Jersey Law Journal* reported as possibly the "largest award for defamation that New Jersey has ever seen," (*N.J.L.J.*, Sept. 27, 1993, p. 3), and what appears to be the second highest defamation verdict ever sustained on appeal.[3] In its published decision, the Superior

---

[3] This statement is based on the notation in a comprehensive defamation treatise that the second largest defamation verdict ever sustained on appeal was the three million dollar verdict in *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119 (7th Cir. 1987). *See*, Robert D. Sack, LIBEL, SLANDER AND RELATED

Court of New Jersey, Appellate Division ("Superior Court"), vacated a bench verdict in excess of $2,000,000, and "elevated" an "advisory" jury verdict in excess of $7,000,000. Unlike the bench verdict, the advisory jury verdict included approximately $5,500,000 in punitive damages. While the compensatory damages alone exceeded the combined net worth of all three Defendants, the Superior Court's imposition of punitive damages was devastating — the award financially annihilated the two New Jersey residents and the small travel agency they ran out of their home, all because of speech they were unable to prove as true. As a result, the Defendants have been forced into bankruptcy and depend for survival on this Court of last resort.[4]

Not only did the Superior Court adopt the jury's award of punitive damages, but such damages were made the very basis of the trial court's choice of law determination. Because the Plaintiffs are all Israeli residents and most of the allegedly defamatory statements were made in Israel, and because Defendants are residents of New Jersey, application of the governmental interests test pitted Israel's interest in compensating its residents against New Jersey's interest in deterring misconduct. Although New Jersey and Israeli defamation law differ in virtually all respects, the only conflict examined by the Superior Court involved the application of

---

PROBLEMS (1995 Supp.) at p. 147. The total verdict in this case is over three times as large.

[4] This Court's recent holding in *Cohen v. Cruz*, __ U.S. __, 118 S. Ct. 1212 (1998), may prevent discharge in bankruptcy of the punitive damage award entered in this case. Therefore, should the advisory jury verdict stand, the $5,500,000 punitive award (almost $8,000,000 now on account of interest) will haunt Defendants for the rest of their lives.

punitive damages: "They are available under New Jersey law, not under Israeli law . . . this difference alone is sufficient to invoke New Jersey law." *Almog v. ITAS*, 689 A.2d at 164.

Relying on its interpretation of *Gantes v. Kason Corp.*, 679 A.2d 106 (N.J. 1996), the Superior Court concluded that New Jersey's deterrence interest outweighs Israel's compensation interest because "deterrence of egregiously wrongful conduct is what punitive damages are all about." *Id.* Standing alone, this analysis may or may not be a proper application of New Jersey's governmental interest test.[5] Nevertheless, the State of New Jersey fails to recognize that its articulated preference for advancing deterrence interests over compensation interests cannot be applied in a defamation case because defamation lawsuits "chill" free speech. This Court has held that, in a defamation case, compensation for damage to reputation is the only legitimate governmental interest. *Gertz v. Welch, Inc.*, 418 U.S. 323, 349 (1974).

Defendants request that this Court grant certiorari and hold that a state cannot, consistent with the First Amendment, impose punitive damages, the only purpose of which are to punish, deter and retaliate against individual, non-commercial, speakers in a defamation case.[6]

---

[5] Defendants are aware that this Court is not concerned with the application of a state choice of law determination, nor should it be. However, when application of that choice of law test intrudes on the free speech guarantees of the First Amendment, as in this case, this Court should become very concerned.

[6] The speech in this case was non-commercial because it did not "propose a commercial transaction." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973).

### A. Punitive Damages in Defamation Cases Violate The First Amendment And, Therefore, Are Unconstitutional

Punitive damage awards in defamation cases amount to punishment of expression and, therefore, violate the First Amendment to the United States Constitution. Since this Court has never expressly passed upon this important issue, this Court should grant this petition for certiorari and safeguard the free speech guarantees of the First Amendment by eliminating the availability of punitive damages in such cases.

This Court has recognized that constitutional challenges to punitive damages raise "important issues." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 818 (1986). In a defamation context, punitive damage awards should raise many suspicious judicial eyebrows since the conduct being punished enjoys constitutional protection.

Many jurists and judicial scholars,[7] including current and former members of this Court, have advocated the abolition of punitive damages in defamation cases. In *Rosenbloom v. Metromedia*, two Justices expressed disapproval with the status of punitive damages in defamation law. 403 U.S. 29, 86 (1971)(Marshall, J., dissenting) ("the appropriate resolution of the clash of societal values [reputation v. speech] is to restrict damages to actual losses"). Justice Marshall, joined by Justice Stewart, explained that punitive damages serve the same purposes as criminal penalties, but noted that unlike criminal penalties, "punitive damages are not awarded within discernible

---

[7] *See, e.g.*, Comment, *Punitive Damages and Defamation Litigation: A Clear And Present Danger to Free Speech*, 64 Yale L.J. 610 (1955); Comment, *The Constitutionality of Punitive Damages in Libel Actions*, 45 Ford. L. Rev. 1382 (1977).

limits but can be awarded in unlimited amounts." *Id.* at 82-83. Accordingly, Justices Marshall and Stewart advocated abolishing punitive damages in defamation actions altogether. *See also, Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 771 (White, concurring) (noting that the efforts to protect speech by focusing on the liability side of the equation — *i.e.*, actual malice, different burdens of proof, the public/private figure distinction, *etc.* — may have failed, and focus should be shifted to the damages side of the equation. In this regard, Justice White stated that "punitive damages [should be] scrutinized as Justice Harlan suggested in *Rosenbloom*, or perhaps even entirely forbidden").

These concerns were echoed by the majority of the Court in *Gertz v. Welch, Inc.*, where the Court held that the sole state interest justifying defamation law was compensation for harm resulting from defamatory falsehoods. 418 U.S. at 348-49 (1974). As the Court stated, "the States have no substantial interest in securing for plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury." *Id.* at 349. Moreover, at least one current member of this Court has suggested that punitive damages in defamation cases may violate the First Amendment. *See Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S. 1, 38 (1991) (Scalia, J., concurring)(stating that "punitive damages, despite their historical sanction, can violate the First Amendment").

The view that punitive damages violate the First Amendment is also evident in the constitutional interpretations of several state supreme courts. *See, e.g., Stone v. Essex County Newspaper, Inc.*, 330 N.E.2d 161, 169 (Mass. 1975) (stating "we reject the allowance of punitive damages . . . in any defamation action, on any state of proof, whether based in negligence, or reckless or willful conduct. We so hold in recognition that the possibility of excessive and unbridled jury

verdicts, grounded on punitive assessments, may impermissibly chill the exercise of First Amendment rights"); *See also, Wheeler v. Green*, 593 P.2d 777, 789 (Or. 1979); *Tasket v. King Broadcasting*, 546 P.2d 81 (Wash. 1976).

Other state courts have held punitive damages unconstitutional when the defendant is considered a non-media defendant, *see Brantley v. Zantop International Airlines, Inc.*, 617 F.Supp. 1032, 1035 (E.D.Mich. 1985), and when compensatory damages are adequate to make a plaintiff whole. *See, e.g., McHale v. Lake Charles American Press*, 390 So. 2d 556, 578 (La. App. 1980)("in view of the substantial award for actual damages . . . an additional award of punitive damages may well have a chilling effect"); *Sprouse v. Clay Communications*, 211 S.E.2d 674, 692 (W. Va. 1975).

The reasoning of *McHale* finds support in this Court's *Dun & Bradstreet* plurality decision, wherein Justice Powell, joined by Justices Rehnquist and O'Connor, discussed the common law rationale for awarding presumed and punitive damages in defamation cases: presumed and punitive damages have historically been available because "proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." 472 U.S. at 760. Thus, according to the *Dun & Bradstreet* plurality, since the extent of actual injury will not always be determinable, punitive and presumed damages should remain available so that the remedies for defamation remain effective. *Id.* Consistent with this rationale, when actual damages in a defamation case can be adequately determined, as in this case, the state interest in awarding presumed and punitive damages

cannot be considered substantial.[8]

Proponents of the above views recognize that punitive damages and the First Amendment are fundamentally at cross-purposes: It is a keystone of First Amendment jurisprudence that speech must not be "chilled;" yet the very purpose and undeniable effect of punitive damage awards in defamation cases is to punish and deter speech. It is no answer to say that punitive damages will deter only unprotected "false" speech because, given the limitations of human perception, memory and communication, certainty as to truth is not judicially knowable. *See generally*, Robert Sack, LIBEL, SLANDER AND RELATED PROBLEMS, 193-197.

In the present case, for instance, the speech of Defendants was true – Shalom Almog is an embezzler and a thief. The fact that the jury did not believe the Defendants bears no epistemological relevance to the inquiry. Defendants possess an accountant's report that proves that the words they stated were true. Evidentiary considerations and major errors by trial counsel, however, meant the accountant's report was never submitted to the jury. Indeed, in trying to submit their "evidentiary proofs" to the jury, Defendants were constrained by many factors: international treaties, rules of evidence, financial limitations, gross errors by trial counsel, and the fact that their witnesses and evidentiary proofs were halfway around the world. While these constraints meant they could not adduce sufficient evidence to convince a jury to find in their favor, it does not mean that what they said was untrue.

---

[8] It should also be noted that *Dun & Bradstreet* involved commercial speech, whereas this case does not. To the extent this Court interprets *Dun & Bradstreet* to permit punitive damages in a defamation case, even where extensive compensatory damages are awarded, it should be limited to a commercial speech context.

Coupled with the prospect of punitive damages which may annihilate a speaker (such as in this case, where the speakers had all their assets, their home, and their life-savings taken away, and were driven into bankruptcy), the speaker's uncertainty as to her ability to prove the truth of her statements in a court of law results in a "chilling effect" on speech. Under such a regime, it is not enough that what the speaker says is true. Now the speaker must worry about whether she will be able to adduce sufficient admissible evidence to prove "truth" in a court of law, gamble that she is likeable enough that a jury believes her, and hope that if the jury does not, a punitive damage award does not wipe her out. It is little wonder that the specter of punitive damages causes persons with lawful messages to convey to "steer far wider of the unlawful zone." *Speiser v. Randall*, 357 U.S. 513, 526 (1958); *New York Times v. Sullivan*, 376 U.S. 254, 278 (1964) ("the pall of fear and timidity imposed [by large damage awards] is an atmosphere in which the First Amendment freedoms cannot survive").

Placing such a burden on an individual exercising his right to free speech wholly contradicts the guarantees that have been accorded to citizens of this nation throughout its history. As such, punitive damages in defamation cases collide with the freedoms guaranteed to each individual citizen of the United States by the First Amendment. Therefore, Defendants request that this Court grant this petition for certiorari and invalidate the use of punitive damages in defamation cases, or at least in cases involving non-commercial speech.

### B. In Holding that Deterrence of Speech Outweighed Compensating Damage to Reputation the Superior Court Ignored *Gertz* and Compromised First Amendment Protection

Defendants' free speech guarantees were also

compromised when the Superior Court improperly ignored this Court's decree in *Gertz* that compensation for injury to reputation is the sole legitimate state interest in a defamation case. *See Gertz*, 418 U.S. at 348-49. Deterring speech was the sole basis of the New Jersey Court's choice of law determination. *Almog, v. ITAS*, 689 A.2d at 164.

As noted above, however, First Amendment values render the deterrence interest less important, if cognizable at all, in a defamation context, where the only legitimate interest is compensation. Consequently, the New Jersey court's decision was directly contrary to this Court's teaching in *Gertz*: that the only "legitimate state interest" in authorizing juries to award damages for defamation is "the compensation of individuals." *Gertz*, 418 U.S. at 341. "The States have no substantial interest in securing for plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury." *Id.* at 349.

Given that compensation is the only legitimate government interest, application of Israeli law was required. *See e.g., Deemer v. Silk City Textile Machinery Co.*, 193 N.J. Super 643, 649 (App. Div. 1984) (foreign jurisdiction's interest in compensation prevails because New Jersey has no interest in compensating non-resident). The application of Israeli law was further compelled by the facts that: respondents are Israeli citizens; the relationship between the parties was centered in Israel's tourism market; the alleged defamation occurred almost completely in Israel;[9] the harm was felt completely in Israel; and finally, most of the witnesses and evidence were in Israel.

---

[9] With regard to Geller, seven out of the nine alleged defamatory statements occurred in Israel. With regard to Almog, 20 out of the 27 alleged defamatory statements occurred in Israel. (Reply Brief, Appellate Division, pp. 22-23).

The entire rationale of the Superior Court's decision, in contrast, was based not on the legitimate goal of compensation, but rather on the notion that New Jersey's alleged interest in deterring defamatory speech justified exporting New Jersey's punitive damage law halfway around the world. In a defamation case, however, punitive damages are "'wholly irrelevant to the state interest' because '[t]hey are not compensation for injury.'" *Dun and Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 770 (1985) (Brennan, J. dissenting) (citing *Gertz*, 418 U.S. at 350). Because deterrence is wholly irrelevant in a defamation case, it cannot be the overriding governmental interest.

Defendants do not quarrel with New Jersey's use of the governmental interest conflicts test, and do not seek review by this Court of that state court issue. Defendants do, however, contend that New Jersey's application of that test, and its explicit declaration that deterring speech is the overriding state interest, collides with the First Amendment and, therefore, demands the intervention of this Court.

## II DEFENDANTS' PROCEDURAL DUE PROCESS RIGHTS WERE VIOLATED WHEN A MULTI-MILLION DOLLAR PUNITIVE VERDICT WAS IMPOSED THROUGH A BIZARRE "ADVISORY" JURY VERDICT PROCEDURE UNKNOWN TO THE COMMON LAW, AND NO JUDICIAL REVIEW WAS PROVIDED.

The Due Process Clause requires that fundamentally fair procedures be provided before a state may take property or, as here, transfer property from one person to another. *See North Ga. Finishing, Inc. v. Di-Chem Inc.*, 419 U.S. 601 (1975); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974). Only meaningful due process review can, as the Fourteenth

Amendment demands, adequately protect the individual from the arbitrary exercise of governmental power. *See, e.g., Honda Motor Co., Ltd., v. Oberg*, 512 U.S. 415, 420-21, 429 (1994).

The $5.5 million punitive damage award entered in this case was made and approved under procedures that violate due process. First, the jury was not properly instructed, as it was told it was not required to make individual determinations of guilt before assessing liability or imposing punitive damages on Defendants. Second, the jury's verdict was unreviewable by the trial court, both by its denomination as "advisory" and by the fact that the trial judge was admittedly non-attentive during the trial. Finally, and most importantly, Defendants were deprived entirely of meaningful appellate review, primarily on account of the use of the bizarre "just in case I'm wrong" advisory jury procedure, as well as the perfunctory nature of the Superior Court's so-called "review." Far from applying objective criteria and carefully comparing the award to other awards and fines for similar conduct — steps approved by this Court in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1995), and mandated in *BMW of North America v. Gore*, 116 S.Ct. 1589 (1996) — the Superior Court simply declared that the conduct was egregious, stating:

> Suffice it to say that the awards were commensurate with the evidence of the defendants' wealth and represent, considering the egregious nature of the torts, an acceptable ratio between compensatory and punitive damages. Most significantly, however, following the jury's return of the punitive damages verdict, the trial judge, in an abundance of caution, afforded defendants an opportunity to demonstrate by way of discrete financial records any alleged excessiveness. Defendants failed in the end to take advantage of that opportunity. We are satisfied that they thereby waived their right to complain of the quantum.

*Almog v. ITAS*, 689 A.2d at 158. This single paragraph was all the "review" the Superior Court afforded. With that single paragraph — a conclusory statement that the award was commensurate with Defendant's wealth, an oblique reference to ratio, and an incorrect finding of waiver — the Superior Court rubber-stamped the "advisory" jury's award and stripped away what Defendants worked their entire lives to earn.[10] The lack of meaningful review was particularly stunning in this case as the multi-million dollar punitive damage award was implemented pursuant to a procedure that was so odd that it had never been utilized in the history of American jurisprudence, the elevation on appeal of an "advisory verdict."

"Judicial review of the size of punitive damages awards has been a safeguard against excessive verdicts for as long as punitive damages have been awarded." *Honda Motor Co., Ltd., v.* Oberg, 512 U.S. 415, 421 (1994). Under the traditional common-law approach to punitive damages, a jury initially determines the amount of a punitive award, after being appropriately instructed. *Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S. 1, 15 (1991). The jury's determination is then reviewed by trial and appellate courts to determine "whether a punitive award is reasonably related to the goals of deterrence and retribution." *Id.*

Courts have consistently held that this method does not violate due process, *Id.* at 17. However, in cases where this procedure is absent and where the application of such procedure would have provided protection against arbitrary and inaccurate adjudication, "this Court has not hesitated to find the

---

[10] In fact, it took away more. Defendants combined net worth at the time the verdict was rendered was $3,305,000, (Raa 134), less than one half the amount of the verdicts. Today Defendants' net worth is even less and the verdicts, due to interest, even more.

proceedings violative of due process." *Honda*, 512 U.S. at 430.

### A. The Jury Was Misinstructed In That It Did Not Make Individual Determinations of Guilt

One of the circumstances this Court considered in *Haslip* in affirming the punitive award against the defendant was the fact that the jury instructions provided helpful guidance to the jury in determining its verdict. 499 U.S. at 19-20. In the present case, however, the jury instructions served affirmatively to confuse and misguide the jury, instructing them, among other things, that they were not required to give individual consideration to each defendant. The jury was essentially told it could lump all the Defendants and dump one combined punitive damage award on them. The instruction read, in relevant part: "if you find . . . it would be impracticable if not impossible to allocate punitive damages to each defendant separately, then you may render one punitive damage award against all defendants jointly and severally." (Da 600.) This "lump and dump" procedure was unconstitutional because it deprived Defendants of individual determinations of guilt, a hallmark of due process. *Cf. Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974) (state courts may not impose liability without fault in defamation actions); N.J. STAT. ANN. § 2A:15-5.13(e) (West 1998) (enacted in 1995, after the verdict in this case) ("In any action in which there are two or more defendants, an award of punitive damages must be specific as to a defendant, and each defendant is liable only for the amount of the award made against that defendant").

This same "lump and dump" procedure plagued the liability phase of the trial as well. After stating: "I'm treating ITAS and Shar and Ziemke as one entity here," (Court, Tr., 8/13/93, p.m., at 40; *see also* pp. 60, 62, 65, 68, 69), the trial court approved, over objection, a jury interrogatory that asked

whether either "ITAS, Ceil Shar, and/or Marilyn Ziemke" (emphasis added) may be found to have committed each element of slander against Almog and Geller. (Tr., 8/13/93, p.m., at 4.) Under such a charge, a finding that one of the three defendants committed the act results in liability against all.[11]

This instruction was especially improper in the present case because of the nature of the offense of slander. Two or more persons cannot utter the same words with the same effect; thus, slander is a tort incapable of joint commission and individual determinations of guilt must be rendered. *Shuping v. Barber*, 89 N.C. App. 242, 249, 365 S.E.2d 712, 716; 50 *Am. Jur.* 2d., LIBEL AND SLANDER, § 348. In a defamation case, the jury must be instructed to determine the liability for punitive damages of each of several defendants separately. *Wilson v. Savino*, 89 A.2d 399, 403 (N.J. 1952); *Refuse & Env. Systems v. Indus. Serv. of America*, 932 F.2d 37, 40 (1st Cir. 1991) ("in order for a defendant to be found individually liable for slander, the defendant must have personally made a slanderous statement about the plaintiff"). In the present case, due process required that an inquiry be made as to whether each defendant individually committed each element of the *prima facie* slander case, and that the individuals be given independent consideration with the punitive damages phase of the proceeding.

---

[11] For example, the jury might have found that Ms. Ziemke satisfied the first element of defamation (but not Ms. Shar and ITAS) and assumed that it, therefore, had to answer "yes" to that particular question (which asked whether Shar, Ziemke and/or ITAS committed the first element). Had the jury been given proper instructions, however, it may have under the same scenario, answered "yes" to Ms. Ziemke, and "no" to Ms. Shar and ITAS, which would have necessitated a no liability finding in favor of Ms. Shar and ITAS on the entire defamation claim.

### B. Defendants Were Deprived of Review at the Trial Level on Account of the Trial Judge's Inattentiveness During Trial And Inability to "Reflect in the Record" His Findings

In *Haslip*, this Court commended the state court for the fact that it required that a trial judge "reflect in the record the reasons" for reviewing, not reviewing, or remitting a punitive award. 499 U.S. at 20. Unlike the trial court in *Haslip*, the trial court here was not required to make findings on the record, and it made none. In stark contrast to the approach approved in *Haslip*, the trial court summarily denied Defendants' post-trial motions from the bench. The absence of any meaningful post-verdict review by the trial judge, including his failure to make findings of fact and conclusions of law, deprived Defendants of due process of law.

In addition, the trial judge was wholly inattentive to the evidence. Shockingly, he even heard motions at sidebar on different cases and conducted conferences in unrelated matters while the trial was proceeding, (Tr. 8/4/93 at 158-160; Tr. 8/4/93 at 80), and while key defense witnesses were testifying he stated he was not listening, or only giving "half an ear's" attention. (Tr. 8/13/93, p.m. at 95 & 7/22/93 at 134.) The Superior Court noted this impropriety, and chastised the trial judge. *Almog v. ITAS*, 689 A.2d at 162, n. 2. Noting the judge's "characteristic skill and diligence," however, the Superior Court was content to regard this as a "procedural lapse that will not be repeated." [12]

---

[12] The trial judge appeared proud of himself for these procedural lapses, stating to the jury: "Ladies and gentlemen ... you've noticed that I've been handling other matters. I'd like to think the taxpayers are getting double their monies worth." (Tr. 7/22/93 at 134.)

Notwithstanding the trial judge's "characteristic skill and diligence," the "procedural lapses" that occurred in this case resulted in a devastating and wholly unreviewed $7,000,000 verdict (including $5,500,000 in punitive damages) against Defendants. Since the New Jersey Supreme Court abdicated its responsibility to correct this unconstitutional error, this Court, as the ultimate expositor of the constitution, must step in.

### C. Defendants Were Deprived Of Appellate Review By Virtue of the Unprecedented Use of the "Advisory" Jury Procedure

In the present case, the post-trial procedure utilized by the Superior and Supreme Courts of New Jersey effectively denied Defendants any meaningful review of the jury's punitive award, and thereby denied Defendants the procedural due process guaranteed them by the Due Process Clause of the Fourteenth Amendment. After trial of the case, the jury, sitting only in an "advisory" capacity and having been instructed based on New Jersey law, awarded over $1,300,000 in compensatory damages and $5,500,000 in punitive damages. At the same time, the trial judge, having ruled that he would decide the case pursuant to Israeli law, awarded over $2,200,000 in compensatory damages to Plaintiffs. Having ruled that the jury's award would be merely an "advisory" verdict, the trial court judge provided no review of the punitive damages awarded by the jury.

On appeal the Superior Court vacated the bench verdict and "elevated" the jury's verdict to the final judgment in the cause. *Almog v. ITAS*, 689 A.2d 158 (N.J. Super. Ct. App. Div. 1997). Since the "advisory" jury verdict was not, at the time of appeal to the Superior Court, the final judgment in the case, and since the bench verdict did not include a punitive award, Defendants properly did not present the issue of whether the punitive award was unreasonable in their arguments to the

appellate court. *See, e.g., Ashland v. Ling-Temco-Vought, Inc.*, 711 F.2d 1431, 1438 (9th Cir. 1983)("[r]eview on appeal is of the findings of the court as if there had been no verdict from an advisory jury, and there can be no review of supposed errors relating to rulings before an instruction to the advisory jury."); *Anderson v. Sills*, 363 A.2d 381 (N.J. 1976) (stating that questions that have become moot or academic prior to judicial scrutiny are improper subjects for judicial review); 9 C. Wright & A. Miller, *Federal Practice and Procedures* § 2335 (1971) ("The review on appeal is from the Court's judgment as though no jury has been present. Since the verdict is advisory only, it follows that the failure of trial counsel to direct a verdict is not reversible error. In fact, a motion for a directed verdict seems pointless").

The Superior Court, after elevating the jury's verdict, recognized that Defendants had not presented the punitive award issue; however, rather than affording Defendants the opportunity to address that issue, the court rubber-stamped the jury's verdict and deemed the issue waived. *Almog v. ITAS*, 689 A.2d at 166. In this regard, the Superior Court erred. Defendants submitted a post-trial motion in which they argued against the punitive verdict. On appeal, the punitive award was plainly not in effect. Therefore, Defendants had no fair notice to challenge the verdict or seek review.

On appeal to the Supreme Court of New Jersey, Defendants raised the issue of the reasonableness of the jury's elevated punitive award, as well as the fact the award violated the First Amendment. After briefing and oral argument, however, that court dismissed the appeal, stating without opinion that certification had been improvidently granted. *Almog v. Israel Travel Advisory Service, Inc.*, 704 A.2d 1297 (N.J. 1998).

Through its imprudent and admittedly anomalous procedure, which the Superior Court acknowledged implicated procedural due process, *Almog v. ITAS*, 689 A.2d at 162, 165, the Superior Court nullified Defendants right to judicial review of the jury's punitive award. The jury's $5,500,000 punitive damage award was suddenly hoisted from its role as an "advisory" verdict, not merely to the level of final judgment in the case, but to the level of "final judgment eternal"— an unscrutinized judgment to which procedural due process apparently does not apply. Moreover, the Supreme Court of New Jersey, by dismissing Defendants' appeal to that court, has approved the Superior Court's abrogation of Defendants' due process rights, an approval which contradicts the law this Court developed in its previous decisions.

Given the acute danger of arbitrary deprivation of property posed by the imposition of punitive damage awards by juries, the Due Process Clause of the Fourteenth Amendment requires that punitive damage awards be reviewed for reasonableness by both the trial and appellate courts. *Honda*, 512 U.S. at 420-21; *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 470 (1993) (Scalia, J., concurring). New Jersey has attempted to sidestep this protection, thereby eliminating any meaningful review of punitive damage awards. The altogether unreviewed discretion of the jury is entirely inconsistent with due process. Therefore, Defendants respectfully requests this Court grant this petition and vacate the supernova of a verdict, rendered by a misguided jury, presided over by an apathetic judge and "elevated" by a bizarre "advisory" jury procedure.

## III DEFENDANTS' SUBSTANTIVE DUE PROCESS RIGHTS WERE VIOLATED

While a verdict that is the product of good procedures is not insulated from substantive review, it is entitled to a strong

presumption of validity. *TXO*, 509 U.S. at 457. When the procedures, however, are suspect then the punitive damages that were the product of those procedures are suspect as well, and any presumptions of validity must vanish. *Id.*

The advisory jury's punitive award which was elevated to the final judgment in the case by the Superior Court is grossly excessive and arbitrary in violation of the standards set forth by this Court in *BMW*, 116 S.Ct. 1589 (1996). Therefore, this Court must grant this petition for certiorari so that Defendants' due process rights may be restored.

The Due Process Clause of the Fourteenth Amendment prohibits a State from imposing "grossly excessive" punishment on a tortfeasor. *TXO*, 509 U.S. at 454. In certain cases, punitive damages may properly be imposed; however, when a punitive award can be fairly categorized as "grossly excessive" in relation to the state interests the award is designed to serve, it enters the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment. *BMW*, 116 S.Ct. at 1595.

In determining whether a punitive award is excessive, the state interests that the award is designed to serve must first be identified. *Id.* This Court has held that, in a defamation case, the sole legitimate state interest is to compensate individuals for injury to reputation. *Gertz v. Welch, Inc.*, 418 U.S. 323, 348-49 (1974). Moreover, punitive damages appear not to play a role in the defamation arena unless actual damages cannot be calculated, in which case punitive and presumed damages may act as a surrogate. *Cf. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760-61 (1985).

Regardless of the interest involved, however, a punitive award must withstand the "excessiveness" inquiry. Assuming

this Court finds that an award of punitive damages does not violate the First Amendment, the advisory jury's punitive award cannot withstand the excessiveness inquiry developed in *BMW* and, therefore, must be vacated.

In *BMW*, this Court defined three guideposts to be used in determining whether a jury's punitive damage award is grossly excessive. 116 S.Ct. at 1598. Those guideposts are: (1) the degree of reprehensibility of the act; (2) the disparity between the harm or potential harm suffered and the punitive damages awarded; and (3) the difference between the punitive damages awarded and the penalties imposed in similar cases. *Id.* at 1598-9.

### A. Degree of Reprehensibility

Pursuant to the accepted view that some wrongs are more blameworthy than others, this Court has held that punitive damages imposed on a defendant should reflect the enormity of his offense, *BMW*, 116 S.Ct. at 1599, and may not be "grossly out of proportion to the severity of the offense," *TXO*, 509 U.S. at 453. Moreover, as this Court has stated, "non-violent crimes are less serious than crimes marked by violence or the threat of violence," and conduct is less reprehensible when it "evinces no indifference to or reckless disregard for the health and safety of others." *BMW*, 116 S.Ct. at 1599. With this in mind, a comparison of the case law is very illuminating.

In *Filariga v. Pena-Irala*, 577 F. Supp. 860 (E.D. NY. 1984), the court stated:

> spread upon the records of this court is the evidence of wounds and of fractures, of burning and beating and of electric shock, of stabbing and whipping, and of mutilation, and finally, perhaps mercifully, of death, in

short the ultimate in human cruelty and brutality.

Accordingly, it awarded $5,000,000 in punitive damages to "make clear the depth of the international revulsion against torture and measure the award in accordance with the enormity of the offense;" *See also, Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996) ($300,000 punitive damages awarded for torturing person by binding arms and legs, placing a wooden pole between legs to lift woman into the air, and repeatedly threatening with death); *Xuncax, et. al v. Gramajo*, 886 F. Supp. 162, 169 (average punitive award of 5.5 million to 6 different plaintiffs for a variety of acts of torture, mutilation, and killing); *J.S. and M.S. v. R.T.H*, 693 A.2d 1191 (N.J. App. 1997) ($25,000 punitive damage award against father for repeated sexual abuse of his daughters).

Including pre- and post- judgment interest, Almog was awarded more than the person who was beaten, whipped, burned and, ultimately, perhaps mercifully, killed. Furthermore, Geller was awarded forty times as much as the little girl who was repeatedly sexually abused by her father.

In addition, Defendants' conduct was most certainly non-violent, and did not in any way threaten the health and safety of Almog and Geller, or anyone else for that matter. The conduct of Defendants in the present case involved nothing more than speech, speech which was not actually untrue, but which simply could not be proven as true in the trial court. When the verdict awarded in this case is compared to the verdicts awarded in cases involving truly reprehensible conduct, the absurdity of the award is underscored. It is a grotesque parody of justice to permit a man who was called a thief to be awarded more punitive damages than one who was tortured and killed.

**B. Ratio**

Punitive damage awards must bear a "reasonable relationship" to the harm likely to result from the defendant's conduct, as well as the harm that has actually occurred. *TXO*, 509 U.S. at 460; *BMW*, 116 S.Ct. at 1601-2. A high ratio of punitive to compensatory damages may be justified in cases involving low awards of compensatory damages, or the injury is hard to detect, or the monetary value of non-economic harm difficult to determine, or where the potential loss to plaintiff had defendant succeeded in his scheme is large. *BMW*, 116 S.Ct. at 1602; *TXO*, 509 U.S. at 462. While there is no simple mathematical formula for determining the proper relationship, "a general concern of reasonableness . . . enters the constitutional calculus." *TXO*, 509 U.S. at 458.

In the present case, the jury awarded Plaintiff Almog $1,524,000 in compensatory damages and $4,500,000 in punitive damages. In addition, Cross-Claimant Geller was awarded $40,000 in compensatory damages and $1,000,000 in punitive damages. The ratios of punitive damages to compensatory damages for Almog and Geller, respectively, are 3 to 1 and an astonishing 25 to 1.

Since in *Haslip*, this Court found a ratio of 4:1 to come "close to the line" of constitutional impropriety, 499 U.S. at 23-24, Geller's ratio of 25 to 1 must certainly "raise a suspicious judicial eyebrow." Moreover, the unreasonableness of the awards is underscored by the inherent arbitrariness of the ratios. In awarding only $40,000 in compensatory damages to Geller (38 times less than the amount of compensatory damages awarded to Almog), it is apparent that the jury found Geller to have suffered substantially less harm. This finding, however, is belied by the comparison of the overwhelming 25 to 1 ratio of Geller's punitive to compensatory damage awards and the 3

to 1 ratio of Almog's punitive to compensatory damages.

In addition, when examined in relation to the instances described in *BMW* and *TXO* in which a high ratio may be justified, it is readily apparent that those instances are not analogous to the present case; the present case is not one in which compensatory damages were low or difficult to determine.[13] (Da 538-9.) Moreover, the harm done by Defendants allegedly wrongful acts, in the present case, was apparently measurable rather than "potential," as evidenced by the specific compensatory damages awarded by the jury. Upon closely examining the damages awarded in the present case, it is readily apparent that the required reasonable relationship does not exist between the Plaintiffs' respective punitive and compensatory awards. The awards are arbitrary and grossly excessive, evidencing the "taint" that contaminated the entire verdict.

### C. Comparative Legislative Sanctions

"A reviewing court engaged in determining whether an

---

[13] "Low" certainly does not describe the compensatory award in this case. Not only did Almog receive a specifically determined amount of compensatory damages, Almog essentially received a double recovery. Almog was awarded compensatory damages of $775,000 lost future wages for 17 years into the future as well as $525,000 for injury to his reputation. (Da 462) Obviously, any lost future income awarded to Almog was as a result of the supposed damage done to his reputation. Therefore, the damages awarded to Almog for injury to his reputation were duplicitous. Moreover, Almog's recovery of $ 775,000 in lost future wages was excessive in itself. *See Lewis v. Elliot*, 628 F. Supp. 512, 522 (D.D.C. 1986) ("After *Gertz* . . . a plaintiff cannot recover future damages absent proof they will actually be sustained").

award of punitive damages is excessive should 'accord 'substantial deference' to legislative judgments concerning appropriate sanctions for the conduct at issue.'" *BMW*, 116 S.Ct. at 1603. However, the alleged wrongful conduct in the present case involves speech and, as such, cannot be regulated statutorily by New Jersey without violating the First Amendment to the United States Constitution.

Interestingly, prior to the elevation of the advisory jury verdict, the State of New Jersey enacted the Punitive Damages Act. N.J. STAT. ANN. § 2A:15-5.9 *et seq*. (West 1998). This Act, among other things, capped damages at the greater of a 5:1 ratio or $350,000, required a clear and convincing burden of proof and required individual determinations of guilt. While the Punitive Damages Act was enacted after the lawsuit in the present case was filed and, therefore, does not directly apply, the Act certainly illustrates the concern of the New Jersey legislature that punitive damage verdicts are often excessive and unreasonable. As demonstrated, the punitive awards against Defendants in the present case are clearly excessive, and unreasonable in violation of the standards set forth in *BMW*.

**WHEREFORE**, the Defendants/Petitioners respectfully request that this Court grant this petition for certiorari, vacate all verdicts and remand for a new trial consistent with the Due Process Clause and the First Amendment.

Respectfully Submitted,
MARILYN ZIEMKE, CELIA SHAR AND ISRAEL TRAVEL ADVISORY SERVICE, *Defendants/Petitioners*,

---

**CHRISTOPHER V. LANGONE**
Attorney for Defendants/Petitioners

Dated: May 26, 1998

## INDEX TO APPENDIX
## REQUIRED BY SUPREME COURT RULE 14.1

Decision of Superior Court of New Jersey, Appellate Division, dated February 25, 1997, vacating bench verdict and elevating and affirming jury verdicts ..... App. 1-17

Trial Court's Findings of Fact Rendered From the Bench (Transcript of 8/13/93 p.m., at pp. 112-116) ..... App. 18-21

Order Denying Defendants' Applications For (A) A New Trial; (B) Judgment Notwithstanding the Verdict, entered January 14, 1994 ..... App. 22-23

Order of New Jersey Supreme Court dated August 6, 1997 granting Defendants' petition for a writ of certiorari ..... App. 24-25

Order of New Jersey Supreme Court dated January 21, 1998 dismissing Defendants' appeal and stating certiorari was improvidently granted .. App. 26-27

Order of New Jersey Supreme Court dated February 25, 1998, denying reconsideration of order dated January 21, 1998 ..... App. 28-29

Amended Judgment Order, dated March 11, 1997. App. 30-36

Judgment Order, dated October 8, 1993. .....App. 30-36

***Appendix A***

***Materials Required by Rule 14.1(i)(i): the opinions, orders, findings of fact and conclusions of law ... entered in conjunction with the judgment sought to be reviewed***

In The

**SUPERIOR COURT OF NEW JERSEY**

**APPELLATE DIVISION**

---

SHALOM ALMOG and IRIT ALMOG,

*Plaintiffs-Respondents and Cross-Appellants,*

vs.

ISRAEL TRAVEL ADVISORY SERVICE, INC., a New Jersey Corporation; CELIA SHAR and MARILYN ZIEMKE,

*Defendants-Appellants Cross-Defendant and Cross-Respondents,*

and

BEN AMI GELLER,

*Defendant-Respondent Cross-Claimant and Cross-Appellant,*

and

ISRAEL RODRIGUE and ABIR TRAVEL & TOURS LTD., a Corporation of the State of Israel,

*Defendants.*

App. 2

Superior Court, Appellate Division.

Argued January 28, 1997
Decided February 25, 1997.
Before Judges Pressler, Humphreys and Wecker

On appeal from the Superior Court of New Jersey, Law Division, Essex County.

Christopher V. Langone, admitted pro hac vice, Chicago, IL, argued the cause for appellants/cross-respondents (Broder & Associates, attorneys; Eugene J. Sullivan of Peckar & Abramson, of counsel; H. Neil Broder, on the brief).

David Feinsilver argued the cause for respondents/cross-appellants Shalom Almog and Irit Almog (The Feinsilver Law Group, attorneys; Mr. Feinsilver, on the brief).

Andrew S. Berns, West Orange, argued the cause for respondent/cross-appellant Ben Ami Geller (Lampf, Lipkind, Prupis, Petigrow & Labue, attorneys; Mr. Berns, on the brief).

PRESSLER, P.J.A.D.

Following the five-week trial of this defamation action, the jury returned compensatory damage verdicts against defendants Israel Travel Advisory Service, Inc. (ITAS), and its owners, Celia Shar and her daughter Marilyn Ziemke, all New Jersey residents, in favor of plaintiffs Shalom Almog and his wife Irit Almog and in favor of defendant/cross-claimant Ben Ami Geller, all Israeli citizens. More specifically, the jury awarded Shalom Almog $525,000 for injury to reputation, $775,000 for loss of income, and $24,000 on a book account claim for a total of $1,324,000. It awarded Irit Almog $200,000 for her per quod claim and Geller $40,000 for loss of reputation. The jury

also determined that both Shalom Almog (plaintiff or Almōg) and Geller were entitled to punitive damages, and, following a second trial on that issue, the same jury awarded punitive damages to Almog of $4,500,000 and punitive damages of $1,000,000 to Geller. The jury found no cause for action on defendants' counterclaim against plaintiff. Defendants appeal. Plaintiffs and Geller cross-appeal. We affirm the jury's verdicts in all respects.

This action has a tortuous procedural and factual history. For purposes of addressing the issues raised on this appeal, the following brief factual recitation suffices. The jury could have found from the evidence that defendants Shar and Ziemke, New Jersey residents living and working in Livingston, are in the business of organizing tours to Israel for American travellers. During the period in controversy, the business was highly successful, ITAS sending between 3,000 and 3,500 tourists to Israel annually at a net profit of $500 each. The evidence adduced at the punitive damage hearing supports the finding that in more recent years and at the time of trial, the business was even more financially successful.

ITAS's modus operandi was to arrange for the international flights for its groups through its American agent but to turn all the Israeli arrangements — hotels, meals, sightseeing, entertainment, transportation, and the like — to a licensed Israeli land tour operator. The groups would then be conducted by a licensed Israeli tour guide acting as an independent contractor under arrangement with the land tour operator. In 1984, the Israeli land tour operator with whom ITAS dealt was Trans Global Travel. Geller, who worked as a guide with Trans Global, frequently guided ITAS groups. ITAS's financial arrangement with Trans Global, apparently typical of the Israeli tourist industry, was that Trans Global billed ITAS its actual costs incurred in its arrangements for the

groups plus a flat fee per tourist, an arrangement referred to as "net-net cost plus handling fee." The handling fee at that time was $60 per tourist, and the land tour operator shared it with the American travel agency with whom ITAS worked.

Sometime in 1984 Geller solicited Almog, then a colonel in the Israeli Defense Forces, to enter the travel business upon his retirement from the army and introduced him to Shar and Ziemke. In August 1985, when Almog retired from the army, Trans Global had split into two entities, TGT Travel Ltd. and Transglobal Travel Ltd. Geller and ITAS both elected to stay with TGT, and Almog joined them as a TGT employee, assigned exclusively to the ITAS account. A close working relationship developed between Almog and Geller. A close working relationship also developed between Almog and Shar and Ziemke, who were extremely pleased with his performance. By January 1986, defendants had increased TGT's handling fee to $85. In June of that year, as the result of agreements between TGT and Transglobal, ITAS, Geller and Almog all moved to Transglobal. Because of Almog's and Geller's importance to the ITAS account, Almog was given a minority ownership interest in Transglobal and Geller received, in addition to his salary from Transglobal, $10 out of every handling fee. In March 1988, Almog persuaded ITAS to move its business to another land tour operator, Abir Travel & Tours, Ltd., owned by defaulting defendant Israel Rodrigue. Geller moved to Abir as well and continued to receive $10 of the handling fee. Abir received the same. Almog received the balance of $65, if defendants' testimony were accepted that the handling fee remained at $85, or the balance of $80, if Almog's testimony that it had been increased to $100 were credited. In any event, Almog testified and the jury was free to believe that by September 1988, Almog's income was $190,000 annually.

In the summer of 1988, relations between Almog and Geller became strained after Geller accused Almog of

becoming too self-important. In October 1988, Rodrigue told Geller that Almog was holding back from ITAS by charging for services not actually rendered the touring groups and by not remitting certain rebates. In that month, Geller and Rodrigue went to Livingston with documents they thought demonstrated those charges. The jury was free to conclude from the evidence that not only were these relatively minor matters, involving the cost of box lunches, the use of hostesses, the quality of buses engaged, and a small hotel prepayment discount, but also that Almog's disposition of these matters was perfectly proper and in accord with industry standards and practices. In any event, and without inquiring of Almog at all, Shar and Ziemke immediately determined to fire him. They prepared and signed a letter addressed "To Whom it May Concern," advising that Almog no longer represented ITAS in any way and that vendors and suppliers should deal only with Geller and Rodrigue. When Geller and Rodrigue returned to Israel and showed Almog the letter, Almog telephoned Ziemke and Shar to ask for a meeting. They berated him over the telephone, accused him of embezzling $150,000 and of camouflaging invoices, and called him "inept and schizophrenic." Almog immediately went to Livingston, and during the course of his meeting there with Shar and Ziemke, they also accused him of having fraudulently obtained from them $39,000 by way of two checks drawn to his order the previous summer.

The jury was free to find from the evidence that Almog returned to Israel to look for another job but was unable to find one either in the tourist industry or indeed in any other industry in Israel because of the savage campaign of slander and libel that Shar and Ziemke then maliciously undertook against him both in the United States and in Israel. It was not until 1990 that Almog was finally able to find work at a greatly reduced salary as a plant manager in the Dominican Republic. The jury was free to find that Shar and Ziemke had falsely, repeatedly

and to great effect accused him of gross theft and of having an extramarital affair with his ex-wife. The jury could also have found that they published these stories to anyone who would listen, including Almog's former commanding officer, who advised him to leave Israel as his reputation and prospects were finished there. Both Almog and his wife gave testimony that the jury was free to credit respecting the substantial physical and emotional harm done to them as a result of defendants' actions.

Geller continued in defendants' good graces until August 1990. By that time, ITAS had returned its business to Transglobal, and Geller, by then acknowledged as a "top guide" in Israel, had followed. In the summer of 1990, Geller was hospitalized after suffering a stroke. When he was released from the hospital, he entered into an agreement with Transglobal, whereby Transglobal promised him twenty days of work each month until February 1991, when the arrangement would be reevaluated. Under the terms of that agreement, Geller was not required to work exclusively on ITAS tours and his per-tourist fee was increased to $15. The jury was free to find from the evidence that when Transglobal's principal, Benny Sivan, advised Shar and Ziemke of this agreement, they became enraged, vowed to "punish" Geller, called him a thief and refused to permit him to guide the tour scheduled for October. Sivan thereupon refused to handle that tour, and ITAS then severed its relationship with Transglobal. Thereafter Transglobal entered into a relationship with an American competitor of ITAS[1] and Geller continued to work both for Transglobal and other companies. At that point

---

[1] The ensuing litigation between ITAS and that competitor is the subject of *Israel Travel Advis. Serv. v. Israel Iden. Tours*, 61 F.3d 1250 (7th Cir.1995), affirming the dismissal of ITAS's claims.

defendants mounted a retaliatory defamatory campaign against Geller, accusing him to all and sundry of having seduced the daughter of a major Israeli restaurant owner and causing Geller and his wife to be subject to criminal investigation by the Israeli tax authorities, by whom he was eventually exonerated after suffering out-of-pocket losses, impairment of reputation, and emotional distress.

In summary, we are satisfied from our review of this record that the jury had an ample evidential basis from which to conclude that defendants Shar and Ziemke and their company took concerted, malicious and purposeful action over a significant period of time to destroy both Almog and Geller as respected members of their community, that they did so with total disregard of the truth or of the personal consequences to them and their families, and that in large measure they succeeded.

The Almogs instituted this action in October 1989 in the Law Division, Essex County, by filing a twenty-nine count verified complaint against ITAS, Shar, Ziemke, Geller, Rodrigue and Abir, asserting a variety of causes, including defamation, intentional infliction of emotional harm, breach of contract, tortious interference with contractual relations and prospective economic advantage, and book account debts. Defendants ITAS, Shar and Ziemke responded by filing an action in Israel against the plaintiff, seeking over half a million dollars in damages from him on theories of trade libel and misappropriation of funds, making sure, as the jury was free to find, that the details of their cause of action were reported in the Israeli press. Eventually, the contours of this litigation were drawn by Rodrigue and Abir defaulting, the trial court's denying defendants' motion for dismissal on the ground of forum non conveniens, the filing by defendants of an amended answer and counterclaim, Geller's filing of an amended answer

and cross-claim charging defendants with various defamation causes, and defendants' abandonment of their Israeli action after entry by the Law Division of an order enjoining them from proceeding with their suit there, an order we affirmed on appeal by leave granted under Docket Number A-5275-90.

This five-week trial ensued. During the course of his summation, plaintiffs' attorney withdrew their affirmative claims against Geller. The trial judge charged the jury and sent it out to deliberate. It was during deliberations that the anomalous events giving rise to several main issues on appeal took place. In sum, the trial judge had reserved on defendants' application to apply Israeli rather than New Jersey law to plaintiffs' causes of action. Without deciding that issue, the trial judge had correctly charged the jury on New Jersey law. After the jury retired to commence its deliberations, the judge concluded that Israeli law should apply and since there are no civil juries under Israeli law, he further concluded that he should decide the case without a jury, rendering a bench verdict but deciding to take the verdict of the jury, which had no idea of what was then transpiring, as an advisory verdict. Beyond the conceptual problems posed by this procedure, there were practical problems as well, since the judge had, from time to time during the trial, been attending to other legal matters both on the bench and in chambers, having explained to the jury that his presence was not required one hundred percent of the time. Consequently, although the judge undertook to render a bench verdict, it appeared from the record that he had not given the trial his full attention.[2] Nevertheless, he found defendants

---

2 Because we have decided that it is the jury verdict that must stand, not the bench verdict, we need not further address this aspect of the judge's conduct during the trial, since it did not affect the jury's verdict. We appreciate that the judge was motivated by a commendable desire to expedite other matters for

liable to both plaintiffs and Geller in defamation; awarded Geller total compensatory damages of $200,000; awarded Almog damages for loss of income of just over $900,000; reserved on the damage to reputation claim; reserved on Irit Almog's per quod claim; dismissed defendants' misappropriation counterclaim; reserved on the punitive damages claims; and sanctioned Shar $500 for each expletive she used during the course of her pretrial deposition, which was read into evidence since she did not appear at trial on the ground of illness.

After the foregoing events took place in the courtroom, the jury, entirely unaware of what had occurred during its deliberations, returned with the verdict we have already referred to, namely, a total compensatory award of $1,324,000 for Shalom Almog, $200,000 for Irit Almog, and $40,000 for Geller. A date was set for a supplementary trial on punitive damages, the jury returning five weeks later for that purpose. Again unaware that its fact- finding would not be dispositive, it returned the punitive damages awards we have described, namely, $4,500,000 for Almog and $1,000,000 for Geller.

We consider the issues raised on appeal in light of the foregoing recitation. We preface our specification of the issues, however, with this observation. R. 2:6-2(a)(5) requires that the party's legal argument be made under "appropriate

---

which he was responsible and that he may have obtained the consent of counsel to his conduct. Nevertheless, his place was obviously on the bench and attending to the proceedings throughout. Beyond that, the judge's conduct made it impossible for him to render a bench verdict since he had missed some of the evidence. In view, however, of the judge's characteristic skill and diligence, we need make no further comment on what we are satisfied was a procedural lapse that will not be repeated.

point headings." Those are the arguments we consider. We are aware that by their copious footnotes, defendants suggest other legal issues. Raising legal issues on appeal in that manner is, however, wholly improper, putting the responding party at a disadvantage that implicates due process concerns. The respondent on appeal has a right to know precisely what legal arguments are being made and, in our view, need not respond to oblique hints and assertions made in footnotes. We do not suggest that footnotes in a brief are necessarily improper. They may be useful in limited situations for purposes of clarification of relevant ancillary matters or the like. We will not, however, countenance the raising of additional legal issues by that technique. Accordingly, we confine our address of the issues to those arguments properly made under appropriate point headings. We are also constrained to note that appellant's footnotes were printed in type considerably smaller than permitted by R. 2:6-10, so small, in fact, as to be barely legible. We regard this violation of the format rule as serious. If a party intends the court to read the footnotes, they will have to be printed in conformance with the rule.

Defendants argue (1) that their motion to dismiss on forum non conveniens grounds should have been granted, (2) that the bench verdict cannot stand because of the judge's inattention and his improper application of Israeli law and its effect of denying defendants their right to a trial by jury, (3) that there was insufficient competent evidence of defamation to warrant sending the case to the jury, (4) that the judge erred in not making individualized determinations as to each of the three defendants (and by inference that the unallocated jury verdict suffered from the same defect), (5) that the judge erred in barring evidence proffered in aid of their truth defense, and (6) that they were unduly prejudiced by plaintiffs' attorney's attack on their character during his closing argument. Plaintiffs and Geller cross appeal from the judge's decision to render a bench

verdict based on Israeli law, assert that New Jersey law applies, and argue that the jury's verdict on both compensatory and punitive damages be reinstated as the final verdict in the case.

We deal with the issues seriatim. We affirm the pretrial ruling denying the motion for dismissal on forum non conveniens grounds. We recognize that a cause of action involving citizens of different countries, events occurring in different countries, and evidence and witnesses located in different countries is inevitably affected by convenience considerations. We are, however, guided by well-settled principles. First, the plaintiff's choice of forum will ordinarily not be disturbed except upon a showing that it is demonstrably inappropriate. *Civic Southern Factors Corp. v. Bonat*, 65 N.J. 329, 332-333, 322 A.2d 436 (1974); *Am. Home Products Corp. v. Adriatic Ins.*, 286 N.J.Super. 24, 35, 668 A.2d 67 (App.Div.1995). Application of that standard requires a consideration of both private interest and public interest factors. Private interest factors include accessibility to sources of proof, the availability of compulsory process, whether there are premises to be viewed, and the practical concerns making a case susceptible to effective trial, including the enforceability of the ultimate judgment. The public interest factors address the burden imposed on the chosen forum as balanced against the forum's interest in the matter. *See D'Agostino v. Johnson & Johnson, Inc.*, 225 N.J.Super. 250, 262-263, 542 A.2d 44 (App.Div.1988), *aff'd*, 115 N.J. 491, 559 A.2d 420 (1989). And see *Mowrey v. Duriron Co.*, 260 N.J.Super. 402, 409-410, 616 A.2d 1300 (App.Div.1992); *Westinghouse v. Liberty Mut. Ins.*, 233 N.J.Super. 463, 469-470, 559 A.2d 435 (App.Div.1989). In the end, the question is simply whether plaintiff's choice of forum imposes a real hardship on defendants or results in undue harassment and vexation to them or to the legal system. *See, e.g., Creative Business v. Magnum*, 267 N.J.Super. 560, 572, 632 A.2d 298 (App.Div.1993).

We conclude, essentially for the reasons stated by the motion judge who denied the application, that there was nothing manifestly inappropriate about plaintiffs' choice of forum. We further note that many of the witnesses were here, and defendants themselves are residents here. Defendants had conceded the applicability of international treaties for the purpose of obtaining depositions in Israel of Israeli residents who would not voluntarily appear here. *See also* R. 4:11-5. Such documentary evidence as was not located here was readily transportable. All defendants' books and records are here. Moreover, there was no showing by defendants that they have assets in Israel available for satisfying a judgment. They have, however, considerable wealth available in New Jersey for that purpose. Finally, New Jersey has a substantial interest in the matter since the conduct of individuals resident here and a corporation doing business here was the matter in issue.

We address next the issues arising out of the jury-trial/bench-trial anomaly. The key question is choice of law. We conclude that New Jersey law applies. Consequently, we also conclude that the trial judge erred for that reason, if for no other, in rendering a bench verdict. And we are persuaded, under the unique circumstances here, that the jury verdict as to both compensatory and punitive damages must therefore be deemed to constitute the final judgment in the case.

First as to choice of law. As we have noted, egregious misconduct was committed in New Jersey, elsewhere in the United States, and in Israel by New Jersey residents. Malicious defamation was published in and from this State. Key events occurred in New Jersey, including the two fateful meetings in Livingston we have already described. Underlying contracts and agreements were made here. A fuller remedy is available to the victims under New Jersey law than in Israel in respect of the scope of damages. The question is whether these

significant contacts with New Jersey weight the application of the governmental interest test in favor of New Jersey law or Israeli law. We have no doubt in light of the totality of the circumstances that New Jersey's interest in the controversy as a whole is paramount to Israel's.

As the Supreme Court recently explained in *Gantes v. Kason Corp.*, 145 N.J. 478, 484-485, 679 A.2d 106 (1996), conflicts of law analysis requires the court first to identify the disparity in the law of each of the jurisdictions and then to identify the governmental policies of each underlying its own law. The parties agree that the codified defamation law of Israel specifies an apparently greater scope of defenses than does New Jersey's, although it is not at all clear that defendants' conduct would be any more defensible in Israel than here. The heart of the conflicts concern is, however, punitive damages. They are available under New Jersey law, not under Israeli law. We are satisfied that this difference alone is sufficient to invoke New Jersey law, particularly since a good deal of the defamatory conduct took place in this State as well as elsewhere in the United States. *Gantes* informs that conclusion. As the Court there made clear, this State has a significant interest in deterring wrongful conduct by its residents. The goal of our tort law is not only to afford the victim a remedy for a wrong but to deter the resident tortfeasor and others who would commit such wrongs from engaging in that wrongful conduct. *Id.* at 489, 679 A.2d 106. Deterrence of egregiously wrongful conduct is also what punitive damages are all about. Moreover, we do not see, and it has not been suggested to us with any particularity, how Israeli law would be offended by the application of New Jersey law in this regard. Certainly the fact that it does not award punitive damages is not indicative of an interest in whether New Jersey law allows assessment of a punitive damages award against a New Jersey resident. The point, of course, is that its citizens are not being

so assessed. By the same token, we do not see how Israeli law can reasonably be regarded as offended by one of its citizens being fully vindicated in the courts of another jurisdiction. In sum, New Jersey's strong deterrent interest does not appear to collide in any appreciable way with the policy of Israeli law.

Having concluded that New Jersey's defamation law applies, we must next determine the effect of that decision on the trial events that transpired from the time the jury retired to deliberate. This much is clear--it renders the bench verdict based on Israeli law a nullity. The issue is whether the bench verdict is also merely a superfluity, permitting the jury's verdicts to stand. We answer this question in the affirmative as well.

The courts of this State have not addressed in a reported opinion the question of whether an advisory jury verdict is ever susceptible of elevation as the judgment in the cause. We are aware that other jurisdictions have considered the question and generally conclude that such elevation is ordinarily inappropriate for several reasons. First, it is not reasonable for the trial judge to be accorded the discretion to choose, after the fact, between the court's determination and the jury's. More significantly, it is recognized that advisory juries ordinarily consider fewer than all the issues and that even where they consider all the issues, trial strategy is, to a significant extent, dependent upon who the ultimate fact finder will be. Consequently, issues of procedural due process are implicated when the judge defers, after the fact and without prior notice to the parties, to the advisory jury as the final arbiter. *See, e.g., Thompson v. Parkes*, 963 F.2d 885, 887-890 (6th Cir.1992); *Bereda v. Pickering Creek Indus. Park, Inc.*, 865 F.2d 49, 53 (3d Cir.1989); *Pradier v. Elespuru*, 641 F.2d 808, 811 (9th Cir.1981). Those concerns are obviously not, however, implicated here and defendants do not object to "elevation" of

the jury verdict as a conceptual matter. The point, of course, is that it was not until the jury retired to deliberate, after summations and charge, that its status as the final arbiter was challenged. The lawyers proceeded tactically on the understanding that this was a jury trial, as did the court. Nor did the jurors have any inkling during their deliberations that their status was anything but that of ultimate finders of the facts. That was what the judge had told them, and that is how they proceeded. The same is true of the later punitive damages trial. Thus, nothing to the contrary said by the trial judge entered into or affected or tainted the way the lawyers tried the case to the jury or the way the jury deliberated. In effect, this jury never functioned as or was constituted or denominated as an advisory jury. Consequently, there is no prejudice we can perceive in accepting the jury's fact-finding as the final verdict. On the other hand, not to do so would impose unnecessarily and egregiously on the parties and the court system. There is no reason to permit that to happen in the unique and anomalous circumstances here.

The balance of defendants' arguments require little discussion. R. 2:11-3(e)(1)(A), (B), and (E). The evidence of defendants' intentional, malicious and egregious wrongdoing was overwhelming. The defendants, moreover, acted in concert and as a unit, each endorsing and cooperating in the other's actions. Indeed, most of the actions were joint. The three defendants were represented by a single attorney. There was no claim by any of the three against any of the others for indemnification or contribution. In these circumstances we are satisfied that the unitary verdict of joint liability without individualized verdicts as to each or allocation of responsibility among them was entirely appropriate. We note, moreover, that defendants did not object on this ground at trial to the judge's charge, which instructed the jury that they could find defendants individually liable or jointly and severally liable, or

to the implementing interrogatories submitted to the jury. We are convinced that if it was error not to require individualized verdicts, that error was not, in the circumstances, plain error.[3] We are satisfied that the trial judge properly exercised his discretion in his evidential rulings. The proffered excluded testimony had not previously been disclosed in discovery and would have been unfairly prejudicial to plaintiffs. The judge did not err in its exclusion. *See* R. 4:17-7. And *see Lindenmuth v. Holden*, 296 N.J.Super. 42, 52-53, 685 A.2d 1351 (App.Div.1996). We further note that in the main, the hearsay evidence of Almog was fully corroborated. Its admission, in the light of the evidence as a whole, was not harmful error. Nor can we conclude that, taken as a whole and in context, the summation by plaintiffs' counsel was unduly prejudicial. *See, e.g., Daisey v. Keene Corp.*, 268 N.J.Super. 325, 336, 633 A.2d 979 (App.Div.1993).

There is one last matter we address. Defendants have not challenged the quantum of punitive damages allowed by the jury. Nevertheless, and because of the Supreme Court's expressed concern with runaway punitive damage verdicts in *Herman v. Sunshine Chemical Specialties, Inc.*, 133 N.J. 329, 338, 627 A.2d 1081 (1993), we have carefully examined the evidence adduced at the punitive damages trial. Suffice it to say that the awards were commensurate with the evidence of defendants' wealth and represent, considering the egregious nature of the torts, an acceptable ratio between compensatory and punitive damages. Most significantly, however, following

---

[3] We need not address, because the question is not before us, whether defendants could in the future assert contribution or indemnification rights against each other. *See, e.g., Harley Davidson Motor Co., Inc. v. Advance Die Casting, Inc.*, 292 N.J.Super. 62, 678 A.2d 293 (App.Div.), certif. granted, 146 N.J. 568, 683 A.2d 1163 (1996).

the jury's return of the punitive damages verdict, the trial judge, in an abundance of caution, afforded defendants an opportunity to demonstrate by way of discrete financial records any alleged excessiveness. Defendants failed in the end to take advantage of that opportunity. We are satisfied that they thereby waived their right to complain of the quantum.

The bench verdict of the trial judge is vacated. The jury verdicts respecting liability, compensatory damages, and punitive damages are affirmed in all respects and shall be entered as the final judgment in the cause.

---

***Appendix B***

***Materials Required by Rule 14.1(i)(ii): other relevant opinions, orders, findings of fact and conclusions of law entered in the case***

| | | |
|---|---|---|
| SHALOM ALMOG AND IRIT ALMOG, | : | SUPERIOR COURT OF NEW JERSEY |
| | : | LAW DIVISION: ESSEX COUNTY |
| Plaintiffs, | : | |
| v. | | Docket No. L-15658-89 |
| | : | |
| ISRAEL TRAVEL ADVISORY SERVICE, INC., a New Jersey Corporation; CELIA SHAR a/k/a CEIL SHAR; MARILYN ZIEMKE; BEN AMI GELLER; ISRAEL RODRIQUE; AND ABIR TRAVEL & TOURS, LTD., a Corporation of Israel, | : | **CIVIL ACTION** |
| Defendants. | : | |

**TRIAL COURT'S FINDINGS OF FACT RENDERED FROM THE BENCH (Transcript of 8/13/93, p.m., pp. 112-116)**

THE COURT: Please be seated. The issue before me is whether I should act as an Israeli judge or as an American – or as a New Jersey judge. I feel that the – that issue is to refined and too difficult in the sense of deciding it right away. So what I did was I gave the jury the New Jersey law that applies to defamation.

However, I feel that I am correct in that I should act as an Israeli judge without – with a jury as with – as is the case in Israel, and I find in favor of both plaintiffs on the issues of

defamation and I am about to award partial damages: however, I will treat the jury as an advisory jury. In the event that I'm correct that this is an Israeli case, then the Appellate Division will have the option of deciding whether I'm correct insofar as acting as an Israeli judge or whether the New Jersey jury is the one that they should listen to and whose verdict that they should follow.

I find that the conduct of the defendants toward Ben Ami Geller was outrageous. I don't mean that in the Title 46 – restatement 46 context. I think it was vicious: I think it was unnecessary. I think their conduct in a call to the Mac Hass Nassad was totally unnecessary and beyond the bounds of the good faith requirements that are set forth in the Israeli law concerning defamation. I do not find that the good faith defense which is contained in Section 15 of that law applies here – the plea of good faith. I think that they defamed, outrageously, these two plaintiffs. And with reference to Mr. Geller, in a recent case that I had where a young black man of 30 years of age was put into jail for three days. Our American jury gave him $125,000 – for three days. Mr. Ben Ami Geller was in jail for one day, but he was an older man – he had fought for his country and insofar as my concern is – one element of the damages will be an award to Mr. Geller of $125 – $125,000 for the imprisonment and the – the bad experience with reference to the Mach Hass Nassad and his detention for one day.

I feel that the unnecessary – and I find it to be a fact that the defendants also – unnecessarily impugned his private life with no reason and no necessity to do it – it had nothing to do with their business – by indicating that he had affairs with other women and for that reason, I find another $75,000 I award, for a total to Mr. Geller of $200,000 American.

Insofar as the Colonel is concerned. I feel that what – and

let me say this for the record, that I don't want any snide remarks from the two plaintiff's attorneys about the fact that the defendant law firm here suggested that Israeli law applies – I felt long before they did – or early in the proceedings here – that this was an Israeli case. I think the Connell, Foley, Geiser firm did a marvelous job, but they can't make a silk purse out of a sow's ear.

I think that they ladies had a commendable – commendable goal of bringing people of all faiths to Israel, but somehow along the line they became disoriented. Somehow along the line their zeal became misguiding – misguided and I think that their actions thereafter were unwarranted, violent and vicious and they conducted some – what I would describe as indiscriminate broadsides against Colonel Almog.

As far as I'm concerned, at least - insofar as the loss of his future employment is concerned – although I don't agree that it should be 175 reduced to present value – I think that – my recollection was with $60,000 – I think that any jury in the world would think that they – nobody could last with these women in their present state. I would imagine something around $120,000, since $60,000 was the amount that I though [sic] that colonel Almog had said that he thought he could earn. I will project the additional $60,000 into the future for 15 or 17 years - whenever he's going to be 65 – and discount that to present value at the rate of whatever percentage Mr. Feinsilver projected in – on his projections. So he'll have to work out those projections again. Insofar as the damage –

MR. FEINSILVER: What's the number you're projecting forward?

THE COURT: I – it's $120,000, less $60,000 which makes—

MR. FEINSILVER: It was $50,000 that we –

THE COURT: Well, I thought he said $60,000.

MR. FEINSILVER: No, he testified $50,000. Your Honor.

THE COURT: $50,000? Okay. I think that comes – my arithmetic – 470,000 projected for 15 years – or until he's age 65, discounted to present value. Okay?

I think that damage to his reputation done in Israel was stupendous – was terrible. And the word that I'm searching for, I think, is odious. So, as far as I'm concerned – and let me say this. Nothing comes out of this room about this decision until this jury has rendered everything. And so I'm putting a direct order on everybody in this room that nothing is to be mentioned about my decision. I don't want this jury to be affected by me at all. I think they're going to do a better job than me, but they may not – I don't know.

Insofar, as the damage to Colonel Almog's reputation in Israel, I would like to hear that the jury has to say about that first. That may guide me insofar as the reputation aspect of this loss.

---

| | | |
|---|---|---|
| SHALOM ALMOG AND IRIT ALMOG, | : | SUPERIOR COURT OF NEW JERSEY |
| | : | LAW DIVISION: ESSEX COUNTY |
| Plaintiffs, | : | |
| v. | : | Docket No. L-15658-89 |
| ISRAEL TRAVEL ADVISORY SERVICE, INC., a New Jersey Corporation; CELIA SHAR a/k/a CEIL SHAR; MARILYN ZIEMKE; BEN AMI GELLER; ISRAEL RODRIQUE; AND ABIR TRAVEL & TOURS, LTD., a Corporation of Israel, | : | **CIVIL ACTION** |
| Defendants. | : | |

**ORDER DENYING DEFENDANTS' APPLICATIONS FOR (A) A NEW TRIAL; (B) JUDGMENT NOTWITHSTANDING THE VERDICT**
**(Filed January 14, 1994)**

THIS MATTER having been opened to the Court upon the application of Connell, Foley & Geiser, Esqs. (Thomas S. Cosma, Esq., appearing) attorneys for defendants Israel Travel Advisory Service, Inc., Ceil Shar and Marilyn Ziemke for the entry of an Order granting judgment notwithstanding the verdict, or in the alternative, for a new trial; upon notices to, and in the presence of Feinsilver & Weiner, Esqs. (David Feinsilver, Esq., appearing attorneys for plaintiffs and Lampf, Lipkind, Prupis, Petigrow & LaBue, Esqs. (Andrew S. Berns, Esq.), attorneys for cross-claimant Ben Ami Geller appearing in opposition thereto, and this Court having read and considered the moving and answering papers; submitted by the respective parties; and this Court having the benefit of oral

argument had on November 19, 1993;[1] and for the reasons stated by the Court on the record, and for good cause shown:

IT IS ON THIS 14TH DAY OF JANUARY 1998:

**ORDERED AND ADJUDGED as follows:**

1. The application of defendants Israel Travel Advisory Service, Inc., Celia Shar; and Marilyn Ziemke for judgment notwithstanding the verdict is hereby denied in its entirety.

2. The application of defendants Israel Travel Advisory Service, Inc.; Celia Shar; and Marilyn Ziemke for a new trial is hereby denied in its entirety.

/s/
DOUGLAS T. HAGUE, J.S.C.

---

[1] The transcripts of November 19, 1993, included in record as Pa604 do not appear to contain the oral argument referenced. Therefore, they have not been included in this Appendix. Counsel is not aware of what transcript the Court is referring to.

In The
**SUPREME COURT OF NEW JERSEY**

---

SHALOM ALMOG and IRIT ALMOG,

*Plaintiffs-Respondents and Cross-Appellants,*

vs.

ISRAEL TRAVEL ADVISORY SERVICE, INC., a New Jersey Corporation; CELIA SHAR and MARILYN ZIEMKE,

*Defendants-Appellants Cross-Defendant and Cross-Respondents,*

and

BEN AMI GELLER,

*Defendant-Respondent Cross-Claimant and Cross-Appellant,*

and

ISRAEL RODRIGUE and ABIR TRAVEL & TOURS LTD., a Corporation of the State of Israel,

*Defendants.*

---

*Appeal From the Superior Court of New Jersey Appellate Division*

Decided: Aug. 6, 1997.

**ON PETITION FOR CERTIFICATION:**

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-1679-93T3 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is granted.

WITNESS, the Horable Deborah T. Poritz, Chief Justice, at Trenton, this 6th day of August, 1997

/s/
CLERK OF THE SUPREME COURT

In The
**SUPREME COURT OF NEW JERSEY**

---

SHALOM ALMOG and IRIT ALMOG,

*Plaintiffs-Respondents and Cross-Appellants,*

vs.

ISRAEL TRAVEL ADVISORY SERVICE, INC., a New Jersey Corporation; CELIA SHAR and MARILYN ZIEMKE,

*Defendants-Appellants Cross-Defendant and Cross-Respondents,*

and

BEN AMI GELLER,

*Defendant-Respondent Cross-Claimant and Cross-Appellant,*

and

ISRAEL RODRIGUE and ABIR TRAVEL & TOURS LTD., a Corporation of the State of Israel,

*Defendants.*

---

*Appeal From the Superior Court of New Jersey Appellate Division*

Decided: Jan. 21, 1998.

**ORDER:**

Certification was improvidently granted;

It is ORDERED that the within appeal be and hereby is dismissed.

/s/
CLERK OF THE SUPREME COURT

***Appendix C***

***Materials Required by Rule 14.1(i)(iii): . . . Orders on rehearing:***

---

In The

**SUPREME COURT OF NEW JERSEY**

SHALOM ALMOG and IRIT ALMOG,

*Plaintiffs-Respondents and Cross-Appellants,*

vs.

ISRAEL TRAVEL ADVISORY SERVICE, INC., a New Jersey Corporation; CELIA SHAR and MARILYN ZIEMKE,

*Defendants-Appellants Cross-Defendant and Cross-Respondents,*

and

BEN AMI GELLER,

*Defendant-Respondent Cross-Claimant and Cross-Appellant,*

and

ISRAEL RODRIGUE and ABIR TRAVEL & TOURS LTD., a Corporation of the State of Israel,

*Defendants.*

---

*Appeal From the Superior Court of New Jersey Appellate Division*

Dated: February 25, 1998

**ORDER:**

This matter having been duly presented to the Court, it is ORDERED that the motion for reconsideration of the dismissal of the appeal is denied.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 24th day of February, 1998.

/s/
CLERK OF THE SUPREME COURT

***Appendix D***

***Materials Required by Rule 14.1(i)(iv): the judgment sought to be reviewed.***

| | | |
|---|---|---|
| SHALOM ALMOG AND IRIT ALMOG, | : | SUPERIOR COURT OF NEW JERSEY |
| | : | LAW DIVISION: ESSEX COUNTY |
| Plaintiffs, | : | |
| v. | : | Docket No. L-15658-89 |
| ISRAEL TRAVEL ADVISORY SERVICE, INC., a New Jersey Corporation; CELIA SHAR a/k/a CEIL SHAR; MARILYN ZIEMKE; BEN AMI GELLER; ISRAEL RODRIQUE; AND ABIR TRAVEL & TOURS, LTD., a Corporation of Israel, | : | **CIVIL ACTION** |
| Defendants. | : | |

**AMENDED JUDGMENT PURSUANT TO OPINION RENDERED BY THE SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION ON FEBRUARY 25, 1997**
**(Filed March 11, 1997)**

This matter having come on for trial before a jury on July 12, 1993 through August 16, 1993, and resuming on September 20, 1993 and concluding on September 21, 1993; and this Court having rendered its own bench verdict herein, and having entered Judgment thereon on October 8, 1993; and the defendants Israel Travel Advisory Service, Inc.; Celia Shar and Marilyn Ziemke having taken an appeal from all affirmative damage awards contained inn said judgment as made in favor of the plaintiffs (except for a certain book account award from which no appeal was taken) and from the affirmative Cross-

Claim of defendant Ben Ami Geller; and the plaintiffs and said Defendant-Cross-Claimant having filed a cross appeal to have said jury verdict rendered herein reduced to judgment; and the Appellate Division the Superior Court of New Jersey, Honorable Sylvia Pressler, P.J.A.D., presiding, having had the benefit of oral argument on January 28, 1997; Christopher V. Langone, Esq., and H. Neil Broder, Esq., appearing for defendants Israel Travel Advisory Service Inc., Celia Shar and Marilyn Ziemke; David Feinsilver Esq., of The Feinsilver Law Group, P.C., appearing for plaintiffs, and Andrew S. Berns, Esq., of Lampf, Kipkind, Prupis, Petigrow and Labue, P.C., appearing for Defendant-Cross Claimant Ben Ami Geller; and the Appellate Division having rendered a decision, as set forth in its unanimous written opinion delivered by the Honorable Sylvia Pressler, P.J.A.D., on February 25, 1997 vacating the bench verdict rendered herein and affirming the August 16, 1993 and September 21, 1993 jury verdicts rendered herein in all respects; and for good cause shown, it is on this 11th day of March, 1997,

ORDERED and adjudged as follows:

1. all claims asserted by any of the parties hereto in their respective pleadings herein which were withdrawn or abandoned at trial are dismissed with prejudice;

2. all claims asserted by defendants Israel Travel Advisory Service, Inc., Celia Shar and Marilyn Ziemke against plaintiff Shalom Almog, other than a claim for $39,000.00 are dismissed with prejudice, as having been expressly withdrawn at trial;

3. all claims of defendants Israel Travel Advisory Service, Inc., Celia Shar and Marilyn Ziemke against cross-claimant Ben Ami Geller other than for indemnification and contribution are dismissed with prejudice, as having been

expressly withdrawn at trial;

4. Defendants Israel Travel Advisory Service, Inc., Celia Shar and Marilyn Ziemke's claims against defendant-cross claimant Ben Ami Geller for indemnification and contribution, pursuant to jury verdict, are denied with prejudice;

5. plaintiff Shalom Almog's claims against crossclaimant Ben Ami Geller are dismissed with prejudice, as having been expressly withdrawn at trial;

6. the claims of plaintiffs Shalom and Irit Almog against defendant Israel Travel Advisory Service, Inc., Celia Shar and Marilyn Ziemke for intentional infliction of emotional distress, negligent infliction of emotional distress and outrage, having been dismissed by this Court for failure to state of cause of action as a matter of law, and not having been presented to the jury for a verdict, are denied with prejudice;

7. the claims of plaintiff Shalom Almog against defendant Israel Travel Advisory Service, Inc., for breach of an oral lifetime personal services contract, pursuant to jury verdict, are denied with prejudice;

8. plaintiff, Shalom Almog is hereby awarded, pursuant to jury verdict, compensatory damages for loss of income proximately caused by the defamatory conduct of defendants, Israel Travel Advisory Service, Inc., Celia Shar and Marilyn Ziemke, jointly and severally in the amount of $725,000.00, together with prejudgment interest thereon from October 10, 1989 to the date of the Appellate Division decision (of February 25, 1997) in the amount of $329,092.15;

9. plaintiff Shalom Almog is hereby awarded, pursuant to jury verdict, compensatory damages for injury to his

reputation proximately caused by the defamatory conduct of defendants' Israel Travel Advisory Service, Inc.; Celia Shar and Marilyn Ziemke, jointly and severally in the amount of $525,000.00, together with prejudgment interest from October 10, 1989 to the date of the Appellate Division decision (of February 25, 1997) in the amount of $238,306.85;

10. plaintiff Shalom Almog is hereby awarded, pursuant to jury verdict, punitive damages against defendants Israel Travel Advisory Service, Inc., Celia Shar and Marilyn Ziemke, jointly and severally in the amount of $4,500,000.00 to the date of the Appellate Division decision (of February 25, 1997) in the amount of $2,042,630.14;

11. plaintiff Shalom Almog is hereby awarded, pursuant to jury verdict, compensatory damages on his book account claim against defendant Israel Travel Advisory Service, Inc., in the amount of $24,000.00, together with prejudgment interest thereon from August 17, 1988 (date of demand) to the date of the Appellate Division decision (of February 25, 1997) in the amount of $11,430.58;

12. plaintiff Irit Almog is hereby awarded pursuant, to jury verdict, damages on her *per quad* claim against defendants Israel Travel Advisory Service, Inc., Celia Shar and Marilyn Ziemke, jointly and severally in the amount of $200,000.00, together with prejudgment interest thereon from October 10, 1989 to the date of the Appellate Division decision (of February 25, 1997) in the amount of $90,783.56;

13. defendant-cross claimant Ben Ami Geller is hereby awarded, pursuant to jury verdict, compensatory damages for injury to his reputation proximately caused by the defamatory conduct of defendants, Israel Travel Advisory Service, Inc., Celia Shar and Marilyn Ziemke jointly and severally, in the amount of $40,000.00, together with prejudgment interest from

April 9, 1991 to the date of the Appellate Division decision (of February 25, 1997) in the amount of $13,405.48;

14. defendant-cross claimant Ben Ami Geller is hereby awarded, pursuant to jury verdict, punitive damages against defendant Israel Travel Advisory Service, Inc., Celia Shar and Marilyn Ziemke, jointly and severally, in the amount of $1,000,000.00 together with prejudgment interest from April 9, 1991 to the date of the Appellate Division decision (of February 25, 1997) in the amount of $335,136.99;

15. pursuant to decretal paragraphs 8 through 10 above, JUDGMENT is hereby entered in favor or plaintiff Shalom Almog and against defendants Israel Travel Advisory Service, Inc., Celia Shar and Marilyn Ziemke, jointly and severally, inclusive of prejudgment interest through February 25, 1997, in the amount of $8,360,029.14. Per diem interest shall accrue thereon in the amount of $1,181,51 per day thereafter;

16. Pursuant to decretal paragraph 11 above, JUDGMENT is hereby entered in favor of plaintiff Shalom Almog against defendant Israel Travel Advisory Service, Inc., inclusive of prejudgment interest through February 25, 1997, in the amount of $35, 430.58. Per diem interest shall accrue thereon in the amount of $4.93 per day thereafter;

17. pursuant to decretal paragraph 12 above, JUDGMENT is hereby entered in favor of plaintiff Irit Almog against defendant Israel Travel Advisory Service, Inc., Celia Shar and Marilyn Ziemke, jointly and severally, inclusive of prejudgment interest through February 25, 1997, in the amount of $290,783.56. Per diem interest shall accrue thereon in the amount of $41.10 per day thereafter.

18. Pursuant to decretal paragraphs 13 and 14 above, JUDGMENT is hereby entered favor of defendant-

crossclaimant Ben Ami Geller against defendants Israel Travel Advisory Service, Inc., Celia Shar and Marilyn Ziemke, jointly and severally, inclusive of prejudgment interest through February 25, 1997, in the amount of $1,388.542.47. Per diem interest shall accrue thereon in the amount of $213.70 per day.

19. plaintiffs Shalom and Irit Almog and co-defendant crossclaimant Ben Ami Geller are hereby awarded taxed costs of this litigation, payable by defendant Israel Travel Advisory Service, Inc., Celia Shar and Marilyn Ziemke, jointly and severally, to be fixed and determined by this Court after submission of affidavits by counsel setting forth the costs sought to be taxed, as incurred by Shalom and Irit Almog and Ben Ami Geller in this litigation. Limited jurisdiction is retained for this purpose;

20. defendant Marilyn Ziemke is hereby sanctioned in the amount of $500.00 for every pejorative she uttered during the course of the depositions in this matter (payable to the party(ies) whose attorney was conducting the deposition at the time(s) of same. Plaintiffs' counsel shall submit an affidavit setting forth within 30 days all pejoratives uttered by Marilyn Ziemke during depositions. Limited jurisdictions is retained for this purpose.

21. defendants Ceil Shar and Marilyn Ziemke are hereby each individually sanctions in the amount of $500.00 for each time that she refused to answer questions, or was otherwise disruptive during the course of depositions in this matter (payable to the party(ies) whose attorney was conducting the examination at the time of each disruptive action. Plaintiff's counsel shall submit within 30 days an affidavit setting forth each instance in which defendants Ceil Shar and Marilyn Ziemke refused to answer questions posed and/or was otherwise disruptive during the course of depositions. Limited jurisdiction is retained for this purpose; and

22. this judgment hereby modifies and supersedes in all respects the Court's previous judgment entered herein on October 8, 1993.

/s/
DOUGLAS T. HAGUE, J.S.C.

Dated: 3/11/97

| | | |
|---|---|---|
| SHALOM ALMOG AND IRIT ALMOG, | : | SUPERIOR COURT OF NEW JERSEY |
| | : | LAW DIVISION: ESSEX COUNTY |
| Plaintiffs, | : | |
| v. | : | Docket No. L-15658-89 |
| ISRAEL TRAVEL ADVISORY SERVICE, INC., a New Jersey Corporation; CELIA SHAR a/k/a CEIL SHAR; MARILYN ZIEMKE; BEN AMI GELLER; ISRAEL RODRIQUE; AND ABIR TRAVEL & TOURS, – LTD., a Corporation of Israel, | : | **CIVIL ACTION** |
| Defendants. | : | |

**JUDGMENT PURSUANT TO DECISION AS TO LIABILITY AND DAMAGES (Reserved only as to the amount of counsel fees, costs and sanctions to be awarded)**
**(Filed October 8, 1993)**

This matter having come on for trial before a jury on July 12, 1993 through August 16, 1993, and resuming on September 20, 1993 and concluding on September 21, 1993; David Feinsilver, Esq., and Connie A. Matteo, Esq. of Feinsilver & Weiner, Esqs., appearing for plaintiffs Shalom and Irit Almog and Andrew S. Berns, Esq. of Lampf, Lipkind, Prupis & Petigrow, Esqs., appearing for defendant cross-claimant Ben Ami Geller and Thomas S. Cosma, Esq., and George M. Parsells, III, Esq., of Connell, Foley & Geiser, Esqs., appearing for defendants Israel Travel Advisory Service, Inc.; Celia Shar and Marilyn Ziemke; and defendants Israel Travel Advisory Service, Inc.; Celia Shar and Marilyn Ziemke having requested that this Court render a decision in conformance with the laws of the State of Israel, as such law was presented to it by counsel

for the defendants; and the trial in this matter having been presented before a jury, and this Court having considered the separate verdicts rendered by the jury, in the form of answers to special interrogatories on August 16, 1993 and September 21, 1993, in rendering its own decision; and for the reasons stated by this Court on the record on August 13, 1993 and September 21, 1993; and for good cause shown this on this 8th day of October 1993.

ORDERED and adjudged as follows:

1. The claims of plaintiffs Shalom and Irit Almog, as well as the crossclaims of defendant-crossclaimant Ben Ami Geller shall be governed by the laws of the State of Israel.

2. the verdicts rendered by the jury in this matter on August 16, 1993 and September 21, 1993 have been utilized by this Court solely for advisory purposes pursuant to this Court's ruling that the plaintiffs and crossclaimant Ben Ami Geller are not entitled to a trial by jury pursuant to the laws of the State of Israel. However, said verdicts of August 16, 1993 and September 21, 1993, are to be preserved, in the event that it is ultimately determined on appeal that the laws of the State of New Jersey are to govern, or that one or more of said verdicts shall control;

3. all claims asserted by any of the parties hereto in their respective pleadings herein which were withdrawn or abandoned at trial are dismissed with prejudice;

4. all claims asserted by defendants Israel Travel Advisory Service, Inc., Celia Shar and Marilyn Ziemke against plaintiff Shalom Almog, other than a claim for $39,000.00 (based on a series of credits and debits) are dismissed with prejudice, as having been expressly withdrawn at trial;

5. all claims of defendants Israel Travel Advisory Service, Inc., Celia Shar and Marilyn Ziemke against cross-claimant Ben Ami Geller other than for indemnification and contribution are dismissed with prejudice, as having been expressly withdrawn at trial;

6. Defendants Israel Travel Advisory Service, Inc., Celia Shar and Marilyn Ziemke's claims against defendant-cross claimant Ben Ami Geller for indemnification and contribution (which were rejected by the jury) are denied;

7. plaintiff Shalom Almog's claims against crossclaimant Ben Ami Geller are dismissed with prejudice, as having been expressly withdrawn at trial;

8. the claims of plaintiffs Shalom and Irit Almog against defendant Israel Travel Advisory Service, Inc., Celia Shar and Marilyn Ziemke for intentional infliction of emotional distress, negligent infliction of emotional distress and outrage, having been dismissed by this Court for failure to state of cause of action as a matter of law, and not having been presented to the jury for a verdict, are denied;

9. the claims of plaintiff Shalom Almog against Defendant Israel Travel Advisory Service, Inc., for breach of an oral lifetime personal services contract are denied;

10. this Court finds by a preponderance of the credible evidence that defendants Israel Travel Advisory Service, Inc., Celia Shar and Marilyn Ziemke and defamatory statements of fact which concerned said plaintiff, with actual knowledge that the statements were false or with a reckless disregard for the truth or falsity thereof;

11. this Court finds that plaintiff Shalom Almog is entitled to recover compensatory damages for loss of income

proximately cause by such defamatory statements in the amount $911,141.47, plus prejudgment interest thereon from October 10, 1989 to the date of this judgment, in the amount of $112,804.51;

12. this Court finds that plaintiff Shalom Almog is entitled to recover compensatory damages for injury to his reputation proximately caused by the defamatory statements in the amount of $500,000.00, plus prejudgment interest from October 10, 1989 to the date of this judgment in the amount of $149,034.24;

13. this Court finds by a preponderance of the credible evidence that plaintiff Shalom Almog is entitled to recover compensatory damages on his 'book account' claim (or claim based on a series of debit and credits) in the amount of $24,000.00, plus prejudgment interest thereon from August 17, 1988 (date of demand) to the date of this judgment, in the amount of $8,992.77;

14. this Court finds that plaintiff Irit Almog is entitled to recover damages due to her loss of Shalom Almog's services, society, and consortium in the amount of $200,000.00, plus prejudgment interest thereon from October 10, 1989 to the date of this judgment in the amount of $59,613.69;

15. this Court finds by a preponderance of the credible evidence that defendants Israel Travel Advisory Service, Inc., Celia Shar and Marilyn Ziemke communicated to persons other than crossclaimant Ben Ami Geller false and defamatory statements of fact concerning Ben Ami Geller with actual knowledge that the statements were false or reckless disregard of the truth or falsity thereof;

16. this Court finds that Ben Ami Geller is entitled to recover compensatory damages for injuries proximately caused by such defamatory statements in the amount of $200,000.00,

plus prejudgment interest from April 9, 1991 to the date of this judgment, in the amount of $35,857.53;

17. this Court finds that defendants Israel Travel Advisory Service, Inc., Celia Shar and Marilyn Ziemke by, *inter alia*, signing letters jointly, participating in meetings and conversations where defamatory statements were made, acted jointly; that each said defendant participated in, adopted, approved or ratified the conduct of the others; and that they conduct their affairs jointly to such an extent that it is impractical, if not impossible, to allocate punitive damages to each defendant separately. Hence, all compensatory and punitive damage and cost awards (other than sanctions) provided for herein are against all defendants jointly and severally;

18. pursuant to decretal paragraphs 11 through 13 above, judgment is hereby entered in favor of plaintiff Shalom Almog against defendants Israel Travel Advisory Service, Inc., Celia Shar and Marilyn Ziemke jointly and severally in the amount of $1,765,586.60;

19. pursuant to decretal paragraph 14 above, judgment is hereby entered in favor or plaintiff Irit Almog against defendants Israel Travel Advisory Service, Inc., Celia Shar and Marilyn Ziemke jointly and severally in the amount of $259,613.69;

20. pursuant to decretal paragraph 16 above, judgment is hereby entered in favor of defendant-crossclaimant Ben Ami Geller against defendants Israel Travel Advisory Service, Inc., Celia Shar and Marilyn Ziemke jointly and severally in the amount of $235,857.53;

21. plaintiffs Shalom and Irit Almog and co-defendant crossclaimant Ben Ami Geller are hereby awarded taxed costs

of this litigations, payable by defendants Israel Travel Advisory Service, Inc., Celia Shar and Marilyn Ziemke, jointly and severally, to be fixed and determined by this Court pursuant to Israeli law, after submission of affidavits by counsel settings forth the costs sought to be taxed, as incurred by Shalom and Irit Almog and Ben Ami Geller in this litigation. Limited jurisdiction is retained for this purpose;

22. plaintiffs Shalom and Irit Almog and co-defendant crossclaimant Ben Ami Geller are hereby denied counsel fees pursuant to New Jersey law, payable by defendants Israel Travel Advisory Service, Inc., Celia Shar and Marilyn Ziemke, jointly and severally, to be fixed and determined by this Court after submission of affidavits of service by counsel for Shalom and Irit Almog and Ben Ami Geller. However, this Court will issue an advisory opinion as to amount for appeal purposes. Limited jurisdiction is retained for this purpose;

23. defendant Marilyn Ziemke is hereby sanctioned in the amount of $500.00 for every pejorative she uttered during the course of depositions in this matter (payable to the party(ies) whose attorney was conducting the deposition at the time(s) of same. Plaintiffs' counsel shall submit an affidavit setting forth within 30 days all pejoratives uttered by Marilyn Ziemke during depositions. Limited jurisdiction is retained for this purpose.

24. defendants Ceil Shar and Marilyn Ziemke are hereby each individually sanctioned in the amount of $500.00 for each time that she refused to answer questions, or was otherwise disruptive during the course of depositions in this matter (payable to the party(ies) whose attorney was conducting the examination at the time of each disruptive action. Plaintiffs' counsel shall submit within 30 days an affidavit setting forth each instance in which defendants Ceil Shar or Marilyn Ziemke refused to answer questions posed and/or was otherwise

disruptive during the course of depositions; and

25. this Court finds and certifies pursuant to Rules 1:7-4 and 4:42-2 that;

a. no just cause exists for delay of enforcement of decretal paragraphs 1 through 20, inclusive, pending resolution of this Court's costs and sanction awards, and that

b. the economic resources of the defendants far exceed that of the plaintiffs and that of the cross-claimant;

WHEREFORE, this Court recommends that any appeal be scheduled and heard on an expedited basis.

/s/
DOUGLAS T. HAGUE, J.S.C.

Supreme Court, U.S.
FILED
JUL 27 1998
OFFICE OF THE CLERK

No. 97-1910

In The

# Supreme Court of the United States

October Term, 1997

MARILYN ZIEMKE, CELIA SHAR and ISRAEL TRAVEL ADVISORY SERVICE, INC.,

*Petitioners,*

*vs.*

SHALOM ALMOG, IRIT ALMOG and BEN AMI GELLER,

*Respondents.*

*On Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division*

## BRIEF IN OPPOSITION FOR RESPONDENT BEN AMI GELLER

ANDREW S. BERNS*
PHILOMENA A. McARTHUR
LAMPF, LIPKIND, PRUPIS, PETIGROW & LABUE
A Professional Corporation
*Attorneys for Respondent Ben Ami Geller*
80 Main Street
West Orange, New Jersey 07052
(973) 325-2100

* *Counsel of Record*

147555

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, inc.

## QUESTIONS PRESENTED FOR REVIEW

When the facts of the case are accurately presented, the issues are:

I. Should the petition be denied when defendants/petitioners failed to raise in the New Jersey Appellate Division the issue of whether the punitive damages verdict violated the Free Speech clause of the First Amendment, and the petition misconstrues the caselaw regarding First Amendment speech in defamation actions?

II. Did the New Jersey Appellate Division properly determine that New Jersey law applied to this private defamation suit when New Jersey's interest in deterring egregious and tortious conduct is not outweighed by any substantial Israeli interest?

III. Did the New Jersey Appellate Division correctly determine that the jury charge and jury interrogatories, which permitted individual allocations of liability but did not require them, were not plainly erroneous when defendants presented themselves as one "unit," jointly conspired to defame respondent Geller, and failed to object thereto?

IV. Did the New Jersey Appellate Division properly determine that the jury was not advisory when the lawyers proceeded tactically on the understanding that this was a jury trial, as did the court, the jurors had no idea during their deliberations that their status was anything but that of the ultimate finders of the facts, and nothing said by the trial judge tainted the way the lawyers tried the case to the jury or the way the jury deliberated?

V. Should the petition be denied when defendants refused to provide any information regarding their financial status; waived their right to complain about the amount of punitive damages; and the punitive damages awards were commensurate with the evidence of defendants' wealth and the malicious, destructive and egregious nature of the defendants' acts?

## TABLE OF CONTENTS

*Page*

Questions Presented for Review ..... i

Table of Contents ..... ii

Table of Citations ..... v

Statement of the Case ..... 1

A. Defendants Waived Their Right To Complain About The Punitive Damage Awards. ..... 1

B. Defendants' Defamatory Statements Against Geller And Almog Were False And Were Made With Reckless Disregard Of Their Truth Or Falsity. ..... 3

C. The Appellate Division Did Not Elevate The Verdict of An Advisory Jury. ..... 5

D. The Trial Judge Was Not Inattentive During Trial And Thus Defendants Were Not Deprived Of Review. ..... 7

Reasons for Denying the Writ ..... 8

I. The Issue Of Whether Punitive Damages In This Defamation Action Are Unconstitutional Under The First Amendment Does Not Warrant Review By This Court. ..... 8

*Contents*

*Page*

A. Because Defendants Did Not Raise The Issue, The New Jersey Superior Court Appellate Division Never Decided Whether The Punitive Damages Verdict Violated The Free Speech Clause Of The First Amendment. ..... 8

B. The Petition Misconstrues The Caselaw Regarding First Amendment Speech And Defamation. ..... 9

II. The Appellate Division's Choice-of-Law Determination Is A Plainly Correct Application Of Settled State Law That Does Not Present Any Conflict Warranting Review By This Court. ... 13

A. The Appellate Division Properly Applied The Governmental Interest Test In Concluding That New Jersey Law Applies Because New Jersey's Interest In Deterring Egregious And Tortious Conduct Is Not Outweighed By Any Substantial Israeli Interest. ..... 14

III. The Appellate Division's Determination Regarding Defendants' Due Process Rights Is A Plainly Correct Application Of Settled Law That Does Not Present Any Conflicts Warranting Review By This Court. ..... 17

*Contents*

*Page*

A. The Appellate Division Correctly Determined That The Jury Charge And Jury Interrogatories, Which Permitted Individual Allocations Of Liability But Did Not Require Them, Were Not Plainly Erroneous In View Of Defendants' Presentation Of Themselves As One "Unit", Defendants' Testimony Revealing That They Jointly Conspired To Defame Geller, And Defendants' Failure To Object Thereto. ..... 17

B. The Appellate Division Correctly Determined That The Jury Was Not Considered Advisory Under The Law. ..... 20

C. The Trial Court And Appellate Division Provided A Meaningful Review Of Punitive Damages Notwithstanding Defendants' Strategic Decision To Withhold Their Financial Information, And The Appellate Division Correctly Determined That Defendants Waived Their Right To Complain About The Amount Of Punitive Damages. ..... 22

D. The Punitive Damages Were Commensurate With The Evidence Of Defendants' Wealth And The Malicious And Egregious Nature Of The Defendants' Acts. ..... 23

Conclusion ..... 27

*Contents*

*Page*

## TABLE OF CITATIONS

**Cases Cited:**

*Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986) ... 12

*Almog v. Israel Travel Advisory Service, Inc., et al.*, 298 N.J. Super. 145, 689 A.2d 158 (App. Div. 1997) .. *passim*

*Almog v. Israel Travel Advisory Service, Inc., et al.*, 152 N.J. 361, 704 A.2d 1297 (1998) ..... 1

*Barlow v. Int'l. Harvester Co.*, 95 Idaho 881, 522 P.2d 1102 (1974) ..... 18

*Bereda v. Pickering Creek Indus. Park, Inc.*, 865 F.2d 49 (3rd Cir. 1989) ..... 20

*BMW Of North America, Inc. v. Gore*, 517 U.S. 559 (1996) .....24, 25, 26

*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) .....9, 10, 11

*Gantes v. Kason Corp.*, 145 N.J. 478, 679 A.2d 106 (1996) ..... 14, 15

*Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) ...9, 10, 14

*Hildebrand v. Bd. of Trustees Of Mich. S. Univ.*, 607 F.2d 705 (6th Cir. 1979) ..... 20

*Contents*

*Page*

*Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994) ..... 22, 23, 24

*Inter Medical Supplies LTD. v. EBI Medical Systems*, 975 F. Supp. 681 (D. N.J. 1997) ..... 17, 18, 19, 25, 26

*Lanham v. Keys*, 121 S.E. 856, 31 Ga. App. 635 (1924) ..... 18

*New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) ..... 9

*Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) ..... 12

*Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986) ..... 11

*Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973) ..... 11

*Pradier v. Elespuru*, 641 F.2d 808 (9th Cir. 1981) ... 20

*Refuse & Env. Systems v. Refuse Serv. of America*, 932 F.2d 37 (1st Cir. 1991) ..... 18, 19

*Schoedler v. Motomerter Gauge & Equipment Corporation*, 15 N.E. 2d 958, 134 Ohio St. 78 (1938) ..... 18, 19

*Schuping v. Barber*, 89 N.C. App. 242, 365 S.E. 2d 712 (N.C. App. 1988) ..... 18

*Contents*


| | Page |
|---|---|
| *Stone v. Essex County Newspaper, Inc.*, 330 N.E. 2d 161 (Mass. 1975) | 12 |
| *Tasket v. King Broadcasting*, 546 P.2d 81 (Wash. 1976) | 12 |
| *Thompson v. Parkes*, 963 F.2d 885 (6th Cir. 1992) | 20, 21 |
| *Turf Lawnmower Repair v. Bergen Record Corp.*, 139 N.J. 392, 655 A.2d 417 (1995) | 9, 12, 13 |
| *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993) | 22, 23 |
| *Wheeler v. Green*, 593 P.2d 777 (Or. 1979) | 12 |
| **Statutes Cited:** | |
| N.J. Stat. Ann. § 2A:15-5.9 *et seq.* (West 1998) | 26 |
| N.J. Stat. Ann. § 2A:15-5.13(e) (West 1998) | 17 |
| **United States Constitution Cited:** | |
| First Amendment | i, 1, 8, 9, 11 |
| Fourteenth Amendment | 22, 24 |
| **Rules Cited:** | |
| Fed. R. Civ. P. 39(c) | 20 |
| Sup. Ct. R. 10 | 8 |

*Contents*

*Page*

**Other Authority Cited:**

53 *Corpus Juris Secondum, Libel and Slander* § 115 . 18

**APPENDIX**

Appendix A — Correspondence Dated January 29, 1997 From Andrew S. Berns, Esq., Sent In Response To A Request From The Honorable Sylvia B. Pressler, P.J.A.D., After Oral Argument In The Appellate Division, Regarding Defendants' History Of Refusals To Disclose Their Financial Information . . . . . 1a

## STATEMENT OF THE CASE[1]

The defendants/petitioners are owners/operators of a company that coordinates packaged tours for United States citizens travelling to Israel. The respondents are defendants' former Israeli business associates. This case arose after defendants maliciously made false and defamatory statements about the respondents in an attempt to reduce the fierce competition from a very lucrative business, which resulted when the business relationships between the parties broke down. The petition seeks this Court's review of the opinion of the New Jersey Superior Court, Appellate Division, published as *Almog v. Israel Travel Advisory Service, Inc., et al.*, 298 N.J. Super. 145, 689 A.2d 158 (App. Div. 1997), reproduced at Pet. App. 1-17.

However, this Court should deny defendants' petition because it grossly misrepresents this case both factually and procedurally. In addition, the petitioners' request to review the issue of whether punitive damages in defamation cases violate the First Amendment Free Speech clause is improper and should be denied because defendants never raised this issue prior to their petition for certification to the New Jersey Supreme Court, which, "after full briefing and oral argument," Pet. 1, correctly dismissed defendants' appeal, and determined that certification was improvidently granted. *Almog v. Israel Travel Advisory Service, Inc., et al.*, 152 N.J. 361, 704 A.2d 1297 (1998), reproduced at Pet. App. 26-27.

### A. Defendants Waived Their Right To Complain About The Punitive Damage Awards.

From 1978 until 1990, respondent Ben Ami Geller ("Geller") was a licensed tour guide in Israel working as an independent contractor for defendants Marilyn Ziemke ("Ziemke") and Celia Shar ("Shar"), United States citizens, who own and operate Israel Travel Advisory Service, Inc. ("ITAS"), a New Jersey corporation

---

1. Citations to the record below will be in the following form: "Pet.#" refers to defendants' petition for a writ of certiorari to this Court; "Pet.App.#" refers to defendants' Appendix to their petition; "Db#" refers to a page in defendants' brief filed in the Superior Court, Appellate Division; "Da#" refers to a page in defendants' Appendix to their brief filed in the Superior Court, Appellate Division; "Cca#" refers to a page in respondent Geller's Appendix to his brief filed in the Superior Court, Appellate Division; "Geller App.#" refers to respondent Geller's Appendix to this brief; "T#" refers to the trial transcript.

which provides packaged tours to Israel for United States citizens. The petition describes ITAS as a "small travel agency . . . [which defendants operate] out of their home in Livingston, New Jersey." Pet. 3. However, there is nothing small about ITAS or the services it provides. For over 20 years, ITAS has been almost exclusively providing packaged tours to Israel for citizens of the United States, sending thousands of people to Israel. Da1 to Da48, Da408 to Da449. In fact, defendants run the second largest tour operation, behind only the United Jewish Appeal; even the Appellate Division found that "the business was highly successful, ITAS sending between 3,000 and 3,500 tourists to Israel annually at a net profit of $500 each," and that "in more recent years . . . the business was even more financially successful." *Almog*, *supra*, 298 N.J. Super. at 149.

Notwithstanding defendants' proven financial success, the petition leads this Court to believe that the defendants will become destitute in light of the verdicts. Pet. 7-8, 18. However, defendants were requested on multiple occasions to provide evidence regarding their assets and wealth, and were provided every opportunity to establish the likelihood of any such "destitution;" however, defendants made a strategic decision to refuse to disclose their assets and wealth. (Refer to history of defendants' refusals to disclose their financial information, contained in correspondence dated 1/29/97 from Andrew S. Berns, Esq., sent in response to a request from the Honorable Sylvia B. Pressler, P.J.A.D., after oral argument in the Appellate Division, Geller App. 1a-5a). In addition, defendants failed to argue against the amount of the punitive damages verdict in the New Jersey Appellate Division.

Thus, the Appellate Division appropriately determined that defendants waived their right to complain about the punitive damage awards. *Almog*, *supra*, 298 N.J. Super. at 161-162. It would be unfair and an incredible waste of additional judicial time and energy to hear them complain now, after they have been provided every opportunity, but refused to provide any information that might have established the claimed excessiveness of the punitive damages verdict.

**B. Defendants' Defamatory Statements Against Geller And Almog Were False And Were Made With Reckless Disregard Of Their Truth Or Falsity.**

The petition further misleads this Court to believe that defendants' defamatory statements against the respondents were true. For example, the petition states that in "October, 1988, Geller traveled from Israel to New Jersey to meet with Shar and Ziemke to report a very serious matter: Almog was embezzling money from ITAS," and that "Geller substantiated this claim with documentation." Pet. 3, 13. This is wholly false.

In 1988, Israel Rodrigue, the owner of Abir Travel & Tour, Ltd. (the Israeli land tour operator handling ITAS' business at the time), told Geller that Almog was overcharging ITAS. T109-23 to T111-7, 8/2/93. Contrary to petitioners' claim that "Geller substantiated this claim with documentation," Pet. 3, Rodrigue showed petitioners documents that he claimed reflected overcharges. T71-8 to T74-6, 8/11/93 Vol. I. Because Geller had never been involved in pricing, he had no way of knowing if these documents substantiated the allegations against Almog. T73-8 to T73-19, 8/11/93 Vol. I. The petition further states that an "accounting firm confirmed that Almog had misappropriated large sums of money from ITAS." Pet. 3, 13. In support of this claim, the petition cites merely defendants' allegations in the complaint they filed in Israel. The report that allegedly substantiated petitioners' claim was never entered into evidence, much less produced, in this matter[2].

Defendants' campaign to defame did not stop with Almog. When Geller severed his relationship with ITAS in late 1990, T12-2 to T12-5, 8/11/93 Vol. II, defendants Shar and Ziemke accused him of improperly competing with ITAS, and defaming ITAS. T71-4 to T71-14, 8/9/93 A.M. Session. Subsequent to June, 1990, ITAS, Shar and Ziemke embarked on their campaign to discredit and defame Geller and to injure his personal and professional reputation. T96-17 to T100-3, 8/11/93 Vol. I. Evidence at trial established that defendants maliciously defamed Geller by speaking and writing to individuals throughout the United States

2. In fact, the petition states that defendants never produced the alleged accountant's report due to "evidentiary considerations and major errors by trial counsel." Pet. 13.

and in Israel with the intent to disparage Geller's personal and professional reputation. For example, on September 15 and 16, 1990, defendants wrote to the president of a land tour agency in Jerusalem and alleged that Geller was dishonest, that he was "for sale," and that he was a thief, among other things. Cca65 to Cca79. In correspondence dated December 9, 1990, which was distributed to numerous persons in New Jersey, Illinois, Massachusetts and Florida, defendants accused Geller of being a dishonorable man who was unethical in his business practices. T60-18 to T63-7, 8/9/93 P.M. Session; Cca78 to Cca79.

Defendants also defamed Geller in telephone conversations and correspondence to Rabbis and Presidents of Synagogues in the United States in order to persuade them to refrain from professional dealings with Geller, and to force him out of the U.S.-Israeli tourism business. T81-16 to T83-20, 8/9/93 A.M. Session; Cca76 to Cca77.

In addition, defendants admittedly reported Geller to the Israeli Tax Authorities with the malicious intent of "getting even," and not because they were requested to do so by the Israeli tax authority as the petition erroneously claims at pet. 4. T63-9 to T75-21, 8/9/93 P.M. Session; T3-1 to T20-24, 8/9/93 Vol. III; T86-3 to T87-12, 8/12/93 Vol. I.

Finally, with respect to the issue of the Israeli Tax Authorities, defendants again misstate and take out of context the trial record and provide this Court with less than an accurate account of what actually transpired. In discussing the ramifications of reporting Geller to the Mas Hachnasa (the Israeli Tax Authority) at Pet. 4, defendants again claim that Geller's trial testimony was flawed and that the "cofer" he was forced to pay to avoid unjustified incarceration was ". . . a civil fine in Israel that was paid to avoid criminal indictment." As a matter of fact, even though Geller had paid what is termed a "cofer" under Israeli law in order to avoid any and all further dealings with the Mas Hachnasa, the authorities at the Mas Hachnasa accepted Geller's tax and other financial documentation without negotiation during the course of their subsequent investigation of Geller. The "cofer" was paid by Geller, even though he was innocent of any wrongdoing, to prevent Mr. Geller from having to spend the evening in jail at the time he was

being questioned by the officials at the Mas Hachnasa. Cca 476 to Cca 486.

Defendants sought every opportunity to defame Geller, even to their own prospective United States' client base. For example, when Ms. Rena Levy called ITAS to inquire about Israeli tours, Defendant Ziemke told her that Geller had been fired by ITAS and was a liar, and that defendants were suing Geller for copyright infringement. T27-9 to T53-20, 8/11/93 Vol. I.

Defendants did not limit their malicious gossip to Geller's professional life, but also alleged that Geller had an extramarital affair with the adult daughter of the owner of an often used vendor in Israel, The Lido Restaurant. T48-12 to T61-14, 8/9/93 Vol. III.

Contrary to defendants' attempts to show otherwise, the jury found that all of defendants' defamatory statements against Geller and Almog were not only false, but were made with knowledge that they were false and/or with reckless disregard of their truth or falsity. T57-13 to T58-9, 8/16/93; Da464.

**C. The Appellate Division Did Not Elevate The Verdict of An Advisory Jury.**

This matter was tried before the Honorable Douglas T. Hague, J.S.C., and a jury from July 12 through August 13, 1993. The punitive damage phase of the trial was also tried before Judge Hague and a jury on September 20 and 21, 1993. Following a five-week trial, plaintiffs dropped their defamation claims against Geller based on lack of evidence.[3] T90-6 to T90-9, 8/13/93 A.M. Session; Pet. App. 30-36. Defendants Ziemke, Shar and ITAS' cross-claims against Geller were denied by the trial court and rejected by the jury. T55-6 to T58-14, 8/13/93 P.M. Session; Pet. App. 30-43.

On August 13, 1993, at the conclusion of trial, and *out of the presence of the jury*, Judge Hague stated that he would decide this case sitting as an Israeli judge without a jury[4]. T112-5 to T112-9, 8/13/93 P.M. Session. He allowed the jury to deliberate under

3. And not because "Geller gave trial testimony favorable to the Almogs," as the petition improperly claimed at Pet. 4.

4. A decision made in response to *the defendants' own motion regarding choice of law.*

New Jersey law, and to enter what *he called* an "advisory" opinion. *Id.* However, no mention was ever made of an advisory jury either prior to trial or during trial, and the jury was never informed of its "advisory" role. Accordingly, the Appellate Division properly held that "this jury never functioned as or was constituted or denominated as an advisory jury." *Almog, supra*, 298 N.J. Super. at 160.

The trial judge found defendants liable to the Almogs and Geller in defamation. Pet. App. 37-43. On August 16, 1993, the jury also found in favor of Geller and the Almogs. Da 461 to 465; Pet. App. 30-36. After answering a jury interrogatory indicating a desire to award punitive damages to Almog and Geller, the jury returned on September 20-21, 1993 to hear additional evidence regarding defendants' financial condition. However, defendants refused to provide the requested documentation of their assets and wealth. Geller App. 1a-5a.

The jury awarded compensatory damages in the amounts of $40,000 for Geller; $1,274,000 for Shalom Almog; and $200,000 for Irit Almog; the jury also awarded punitive damages in the amounts of $4,500,000 for Almog and $1,000,000 for Geller. Pet. App. 30-36.

Defendants appealed to the Appellate Division; Almog and Geller cross-appealed and requested that the jury's verdict on both compensatory and punitive damages be reinstated as the final verdict. The Appellate Division properly held that:

> (1) New Jersey was appropriate choice of forum; (2) New Jersey law, rather than law of Israel, applied to action; (3) reversal of bench verdict, rendered in accordance with law of Israel was warranted; (4) elevation of jury's verdict applying New Jersey law as judgment was proper after reversal of trial court's decision to disregard verdict and render bench verdict; (5) unitary verdict of joint liability without individualized verdicts as to each or allocation of responsibility among [defendants] was entirely appropriate; and (6) punitive damage awards were commensurate with evidence of defendants' wealth and represented, considering egregious nature of torts,

acceptable ratio between compensatory and punitive damages.

*Almog, supra*, 298 N.J. Super. at 146.

**D. The Trial Judge Was Not Inattentive During Trial And Thus Defendants Were Not Deprived of Review.**

The petition places unwarranted importance upon the bench verdict, from which defendants are not even appealing. Pet. 21. When the jury verdict became the law of the case, the sufficiency of the trial judge's findings was rendered moot. However, defendants continue to claim that the trial judge was inattentive and thus the defendants were denied meaningful review at the trial level. This contention is simply absurd.

The trial judge presided over a 5 1/2 week trial which jurors were originally told would probably last 2 weeks. During some excruciatingly detailed and boring testimony during the middle of the summer, the trial judge attempted on numerous occasions to keep the jury's interest and attention by reminding them of their importance in the process as the finders of fact and often described their duties as the most important function in the process. To emphasize his point, on a couple of occasions, the experienced trial judge even suggested that the jury function was so important that he could attend to other judicial tasks while trial testimony was being provided. However, to suggest that these few statements by an extraordinarily patient and experienced jurist interfered with defendants' due process rights is simply ludicrous.

It is worth noting that defendants' counsel on the Petition was not their trial counsel and did not attend any portion of the proceeding. In fact, despite the trial judge's statements, the trial was actually interrupted only once when someone emerged from the judge's chambers with a message. Despite the judge's instructions that the proceedings could continue, out of respect for the court, all activity and questioning ceased and all counsel waited for the judge's undivided attention. The trial judge did not handle other matters during this case and any comments by the judge anticipating the need to attend to other issues was motivated solely by the judge's insistence on keeping the jury involved in the case.

## REASONS FOR DENYING THE WRIT

### I.

### THE ISSUE OF WHETHER PUNITIVE DAMAGES IN THIS DEFAMATION ACTION ARE UNCONSTITUTIONAL UNDER THE FIRST AMENDMENT DOES NOT WARRANT REVIEW BY THIS COURT.

Generally, a petition for writ of certiorari will be granted only when accompanied by compelling reasons, such as when

> a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

R. 10 of the Rules of the Supreme Court of the United States. This Court should deny the petition because defendants have no basis upon which to appeal the First Amendment issue.

#### A. Because Defendants Did Not Raise The Issue, The New Jersey Superior Court Appellate Division Never Decided Whether The Punitive Damages Verdict Violated The Free Speech Clause Of The First Amendment.

Prior to their petition for certification to the New Jersey Supreme Court (which dismissed defendants' appeal), the defendants never raised the issue of whether punitive damages in defamation cases are constitutional under the First Amendment. The petition may attempt to explain defendants' failure to raise this issue by stating that the punitive damages verdict was not operative until the Appellate Division entered the jury verdict as the final judgment in the case. Pet. 6. However, the issue of whether New Jersey law (including the punitive damages verdict) should apply was before the Appellate Division for review, if only by virtue of the Geller and Almog cross-appeal. Defendants' only argument against the jury verdict at that time was that "the jury's advisory opinion can never become operative because the jury was instructed as to New Jersey law when Israeli substantive law clearly controls." Db 49. Thus, defendants argued against the jury's verdict in the Appellate Division, but only in the context of whether New Jersey or Israel law applied. Defendants should not be allowed

to raise their previous choice-of-law argument to a constitutional level at this late stage because their initial trial and appellate strategy failed.

Therefore, this Court should deny defendants' petition because defendants have no basis to appeal the First Amendment issue.

**B. The Petition Misconstrues The Caselaw Regarding First Amendment Speech And Defamation.**

Notwithstanding defendant's failure to raise the issue in the Appellate Division, the First Amendment Free Speech clause does not prohibit punitive damages in private defamation cases involving neither the media, "public figures" nor issues of general public importance, especially when liability is based on knowledge of falsity or reckless disregard of the truth or falsity of the defamatory statements. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985); *see also Turf Lawnmower Repair v. Bergen Record Corp.*, 139 N.J. 392, 655 A.2d 417 (1995).

Acknowledging that this Court "is not concerned with the application of a state choice of law determination," Pet. 9, note 5, defendants now attempt to raise their choice-of-law argument to a constitutional level in order to persuade this Court to grant their petition and rule that the First Amendment prohibits punitive damages in private defamation cases. Pet. 7-16. However, this Court must deny the petition because punitive damages are not constitutionally prohibited in this private defamation matter.

The issue raised in the petition is whether the most rigorous constitutional standards are even implicated in this case, in which defendants admittedly spread malicious, destructive and false gossip in the U.S.-Israeli travel community about their former business colleagues, Geller and Almog. Defendants cite *New York Times*, *supra*, for the following proposition: "The pall of fear and timidity imposed [by large damage awards] is an atmosphere in which the First Amendment freedoms cannot survive." Pet. 14 (citing *New York Times*, *supra*, 376 U.S. at 278). However, Defendants cite this quote out-of-context in a case that determined for the first time, the extent to which constitutional protection for speech and

the press limit a state's power to award damages in a libel action brought by a public official against media defendants who criticize his official behavior, which is totally different from the facts presented in this private defamation action.

Approximately 10 years later in *Gertz*, *supra*, this Court examined the constitutional limits on defamation suits by private-figure plaintiffs against media defendants. In light of the "legitimate state interest underlying the law of libel [in] the compensation of individuals for the harm inflicted on them by defamatory falsehood," the critical determination in defamation actions became the classification of an individual as a public or private figure. *Gertz*, *supra*, 418 U.S. at 341. Defendants cite *Gertz* for the proposition that "in a defamation case, *compensation* for damage to reputation is the *only* legitimate governmental interest." Pet. 9 (citing *Gertz*, *supra*, 418 U.S. at 349) (emphasis added); *see also* Pet. 11, 15. However, the petition does not provide the entire holding of *Gertz*, which limited the recovery of presumed or punitive damages only when "*liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.*" *Gertz*, *supra*, 418 U.S. at 349 (emphasis added). The punitive damages in the present case are permissible under *Gertz* because the jury determined that defendants communicated false and defamatory statements about Geller and Almog with actual knowledge that the statements were false and/or with reckless disregard of their truth or falsity. Da461-465.

A decade after *Gertz* this Court considered the constitutional limits on punitive damages in *Dun & Bradstreet*, *supra*, which involved not only a private-figure plaintiff, but also speech of purely private concern. There, a plurality concluded that

> [i]n light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest [in preserving private reputation] adequately supports awards of presumed and punitive damages even absent a showing of "actual malice."

472 U.S. at 761 (opinion of Powell, J.) (Footnote omitted). This Court reasoned that in cases involving purely private concerns

> there is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press.

*Dun & Bradstreet, supra*, 472 U.S. at 760. The punitive damages awarded in the present case are permissible under *Dun & Bradstreet*, especially in light of the actual malice standard that was met in this case.

Notwithstanding *Dun & Bradstreet*'s holding, the petition cites this case for Justice White's concurrence which stated that "punitive damages [should be] scrutinized . . . or perhaps even entirely forbidden." Pet. 11 (citing *Dun & Bradstreet, supra*, 472 U.S. at 771). However, the petition ignores the rest of Justice White's concurrence which suggests retaining the common-law rules "where plaintiff is not a public official or figure." *Dun & Bradstreet, supra*, 472 U.S. at 772.

Note also that the petition attempts to distinguish the present case from *Dun & Bradstreet* by stating that *Dun & Bradstreet* "involved commercial speech." Pet. 12-13, note 8. The petition suggests that punitive damages may be limited to cases involving "commercial speech," *Id.*, and proposes that the present case "was non-commercial because it did not 'propose a commercial transaction.' " Pet. 9 (citing *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973)). However, the issue in the present case is not whether the "speech" was commercial, (although many of the defamatory statements here were entirely commercial, both in nature and intent), but whether the defamation concerned anyone other than private individuals, and was about matters of public concern. Defendants do not and cannot argue that this case concerned either public individuals or matters of public concern. Therefore, none of the First Amendment protection issues at the heart of the caselaw on this subject are even implicated in this case. *See Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 775 (1986) ("When the speech is of exclusively private concern and the plaintiff is a private figure, as in *Dun & Bradstreet*, the constitutional requirements do

not necessarily force any change in at least some of the features of the common-law landscape").

The petition also cites *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 818 (1986), for the proposition that "[t]his Court has recognized that constitutional challenges to punitive damages raise 'important issues.' " Pet. 10. While this may be a generally accurate statement, *Aetna Life Ins.* did not specifically concern the issue of punitive damages.

In addition, the petition cites the following quote from Justice Scalia's concurrence in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991): "punitive damages, despite their historical sanction, can violate the First Amendment." Pet. 11. However, once again, the petition ignores the rest of Justice Scalia's concurrence, which states, "[s]ince jury-assessed punitive damages are a part of our living tradition that dates back prior to 1868, I would end the suspense and categorically affirm their validity." *Pacific Mutual Life Ins. Co., supra*, 499 U.S. at 39-40 (Scalia, J., concurring).

Finally, the petition claims that "several state supreme courts" hold the "view that punitive damages violate the First Amendment." Pet. 11 (citing *Stone v. Essex County Newspaper, Inc.*, 330 N.E. 2d 161 (Mass. 1975); *Wheeler v. Green*, 593 P.2d 777 (Or. 1979); and *Tasket v. King Broadcasting*, 546 P.2d 81 (Wash. 1976). However, New Jersey and the majority of the states follow the federal law on this issue, delineate the class of defamation plaintiffs into public or private figures, and conclude that speech not pertaining to matters of public concern rests more lightly on the free speech/reputation interest scale. *See, e.g., Turf Lawnmower Repair, supra.*

In the present case, this Court should follow its precedents and deny the petition. Evidence at trial established that defendants maliciously made false statements of fact about Geller to individuals throughout the United States and Israel that adversely affected Geller's reputation and business.[5] These allegations were untrue

5. T81-16 to T83-20, 8/9/93 A.M. Session; T60-18 to T63-7, T63-9 to T75-21, 8/9/93 P.M. Session; T3-1 to T20-24, T48-12 to T61-14, 8/9/93 Vol. III; T27-9 to T53-20, T96-17 to T100-3, 8/11/93 Vol. I; T86-3 to T87-12, 8/12/93 Vol. I; T57-13 to T58-9, 8/16/93; Cca65-79; Da464; Pet. App. 30-36.

and were admittedly made for the purpose of destroying Geller's personal and professional reputation. *Id.* Based on the evidence presented at trial, the jury determined that all of defendants' defamatory statements against Geller and Almog were not only false, but were made with actual knowledge that the statements were false and/or with reckless disregard of their truth or falsity. Da461-465. No media action will be chilled here by threat of the legal consequences for commercial slander, and no matter of public concern is involved.

This Court should not permit private defendants, who accuse private individuals of idle, destructive and malicious gossip, to hide behind a constitutional shield erected to guarantee meaningful debate about matters of public concern.

## II.

## THE APPELLATE DIVISION'S CHOICE-OF-LAW DETERMINATION IS A PLAINLY CORRECT APPLICATION OF SETTLED STATE LAW THAT DOES NOT PRESENT ANY CONFLICT WARRANTING REVIEW BY THIS COURT.

The defendants improperly raise their previous choice-of-law argument to a constitutional level, attempting to gain this Court's attention and persuade this Court to grant the petition[6]. However, this Court should deny the petition because the Appellate Division's choice-of-law determination is a plainly correct application of settled law.

---

6. In fact, the petition states that

> Defendants are aware that this Court is not concerned with the application of a state choice of law determination, nor should it be. However, when application of that choice of law test intrudes on the free speech guarantees of the First Amendment, as in this case, this Court should become very concerned.

Pet. 9, note 5.

**A. The Appellate Division Properly Applied The Governmental Interest Test In Concluding That New Jersey Law Applies Because New Jersey's Interest In Deterring Egregious And Tortious Conduct Is Not Outweighed By Any Substantial Israeli Interest.**

First, the constitutional concerns raised by defendants are not at issue in this essentially private dispute. (Refer to Point I, *supra*). *Gertz* distinguished the remedies available for public v. private victims of defamation, and held that "the states may not permit recovery of presumed or punitive damages, *at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.*" *Gertz*, *supra*, 418 U.S. at 349 (emphasis added). To the extent that any perceived constitutional right of free speech is at issue in the present case, the punitive damages are permissible under *Gertz* because the jury determined that defendants communicated false and defamatory statements about Geller and Almog with actual knowledge that the statements were false and/or with reckless disregard of their truth or falsity. Da461-465.

Second, the Appellate Division properly applied the "governmental-interest" test in concluding that New Jersey Law applies because New Jersey's interest in deterring its residents' egregious and tortious conduct[7] is not outweighed by (nor does it offend) any substantial Israeli interest or legal principle. *Almog*, *supra*, 298 N.J. Super. at 158-9 (citing *Gantes v. Kason Corp.*, 145 N.J. 478, 679 A.2d 106 (1996)). In *Gantes*, the New Jersey Supreme Court held that the "governmental interest" test governs New Jersey's choice-of-law disputes. *Gantes*, *supra*, 145 N.J. at 484. The initial prong of the governmental-interest test requires a determination of whether there is an actual conflict between the laws of the respective states. *Id.* Here, the Appellate Division determined that "the heart of the conflicts concern is . . . punitive damages," because "[t]hey are available under New Jersey law, not under Israeli law." *Almog*, *supra*, 298 N.J. Super. at 158. The Appellate Division found that "this difference alone is sufficient to invoke New Jersey law, particularly since a good deal of the

7. And *not* because New Jersey has a superior interest in "deterring speech," as the petition improperly proposes at Pet. 15-16.

defamatory conduct took place in this State as well as elsewhere in the United States." *Id.*

The second prong of the test "requires the court to identify the governmental policies underlying the law of each state and how those policies are affected by each state's contacts to the litigation and to the parties." *Id.* at 485 (citations omitted). *Gantes* recognized that a state's deterrence interest is "a relevant factor to be considered in choice-of-law decisions." *Id.* at 489 (citations omitted). Here, the Appellate Division found that "egregious misconduct was committed in New Jersey, elsewhere in the United States, and in Israel by New Jersey residents," and that "malicious defamation was published in and from this State." *Almog*, *supra*, 298 N.J. Super. at 158. The Appellate Division concluded that New Jersey has an interest in deterring the malicious, tortious conduct of its residents. *Id.* The Appellate Division reasoned that a goal of tort law is "to deter the resident tortfeasor . . . from engaging in . . . wrongful conduct . . . and that deterrence of egregiously wrongful conduct is also what punitive damages are all about." *Id.* at 158-159.

The third prong of the governmental-interest test requires a comparison of "New Jersey's interest in deterrence . . . against any governmental interest that [Israel] has." *Gantes*, *supra*, 145 N.J. at 493. Defendants could never reasonably argue in the present case that Israel has interests in: (1) preventing its residents from being sufficiently compensated for egregious tortious conduct committed by United States' residents; and/or (2) protecting United States residents from punitive damage awards. In the present case, Israel's only legitimate government interest is compensation. The Appellate Division correctly reasoned that Israel's interest in compensating its citizens is adequately addressed by New Jersey law:

> We do not see, and it has not been suggested to us with any particularity, how Israeli law would be offended by the application of New Jersey law in this regard. Certainly the fact that [Israel] does not award punitive damages is not indicative of an interest in whether New Jersey law allows assessment of a punitive damages award against a New Jersey resident. The point . . . is that [Israel's] citizens are not being so assessed.

> By the same token, we do not see how Israeli law can reasonably be regarded as offended by one of its citizens being fully vindicated in the courts of another jurisdiction. In sum, New Jersey's strong deterrent interest does not appear to collide in any appreciable way with the policy of Israeli law.

*Almog*, *supra*, 298 N.J. Super. at 159. Accordingly, the Appellate Division had "no doubt in light of the totality of the circumstances that New Jersey's interest in the controversy as a whole is paramount to Israel's."[8] *Id.* at 158.

Thus, in light of New Jersey's interest in deterring its residents' egregious conduct, the fact that the dispute is unequivocally centered in the United States, and the lack of a substantial countervailing Israeli interest, the Appellate Division properly applied the "governmental-interest" test in concluding that New Jersey Law applies.

Therefore, this Court should deny the petition because the Appellate Division's decision was a plainly correct application of settled law that presents no conflicts warranting review by this Court.

---

8. Contrary to defendants' ridiculous assertion at Pet. 15-16, "deterring speech" was never the "sole basis of [the Appellate Division's] choice of law determination."

## III.

## THE APPELLATE DIVISION'S DETERMINATION REGARDING DEFENDANTS' DUE PROCESS RIGHTS IS A PLAINLY CORRECT APPLICATION OF SETTLED LAW THAT DOES NOT PRESENT ANY CONFLICTS WARRANTING REVIEW BY THIS COURT.

### A. The Appellate Division Correctly Determined That The Jury Charge And Jury Interrogatories, Which Permitted Individual Allocations Of Liability But Did Not Require Them, Were Not Plainly Erroneous In View Of Defendants' Presentation Of Themselves As One "Unit", Defendants' Testimony Revealing That They Jointly Conspired To Defame Geller, And Defendants' Failure To Object Thereto.

Defendants claim that they were denied due process of law because individual determinations of liability were not made as to the compensatory and punitive damages.[9] Pet. 5, 16-20. However, both the trial court and Appellate Division correctly determined that the jury charge and interrogatories, which permitted individual allocations of liability but did not require them, were entirely appropriate under the circumstances, in view of defendants' presentation of themselves as a "unit," defendants' testimony indicating that they jointly conspired to defame Geller, and defendants' failure to object to the jury instructions and interrogatories below.

First, "because defendants raised no objection to the . . . verdict sheet . . . [this Court should] conclude that they have waived any objection to the amount of the award on this basis." *Inter Medical Supplies LTD. v. EBI Medical Systems*, 975 F. Supp. 681, 696 (D. N.J. 1997). In addition,

> [t]his is not a situation in which the error clearly allowed the jury to mistake the burden of proof . . . On the contrary, the jury in this case necessarily evaluated the

9. In support of their petition, defendants refer to N.J. Stat. Ann. § 2A:15-5.13(e) (Supp. 1997) (originally enacted October 27, 1995), which requires allocation of punitive damage awards for each defendant. However, allocation of punitive damages is not required for causes of action filed prior to the effective date of this act. *Id.* (Pet. 19 and 30).

> tortious conduct of all three defendants . . . before arriving at a conclusion regarding punitive damages. Moreover, the jury was properly instructed on the relevant law. The fact that the special verdict sheet invited a "lump sum" award, rather than reflecting a separate amount of punitive damages against each defendant, was a product of the parties' oversight in drafting the verdict sheet, but was not the kind of error that left the jury without adequate guidance on a fundamental question.

*Inter Medical Supplies LTD., supra*, 975 F. Supp. at 698.

Second, the courts have held that an instruction based on joint and several liability in a cause of action based on slander is not improper. *See, e.g., Refuse & Env. Systems v. Refuse Serv. of America*, 932 F.2d 37 (1st Cir. 1991); *Barlow v. Int'l. Harvester Co.*, 95 Idaho 881, 522 P.2d 1102, 1110-1111 (1974) (holding that recovery against defendants can be based on either proof of conspiracy *or* joint action by defendants). However, the petition insists that the trial court's instruction based on joint and several liability was improper because individual determinations of guilt are required. Pet. 19-20. Even assuming that the petition is correct in its assertion, the court's instruction to the jury was not improper because the facts clearly show that the defendants jointly conspired to defame Geller.

In *Schuping v. Barber*, 89 N.C. App. 242, 249, 365 S.E. 2d 712, 716 (N.C. App. 1988), the court explained that in general, slander is an individual tort, and two or more persons each uttering slander against the same individual may not be held jointly liable *in the absence of a conspiracy between or among them. Id.* (citations omitted) (emphasis added). However, where a conspiracy to utter a slander or publish a libel is shown, each of the conspirators is liable for the slander or libel uttered or published by the others in furtherance of the conspiracy. 53 *Corpus Juris Secondum, Libel and Slander* § 115 at 199 (citing *Lanham v. Keys*, 121 S.E. 856, 31 Ga. App. 635 (1924)); *Schoedler v. Motomerter Gauge & Equipment Corporation*, 15 N.E. 2d 958, 134 Ohio St. 78 (1938) (citations omitted). Simply stated, all of the conspirators are

responsible for all the publications even though no one of them was concerned in all. *Id.* (citations omitted).

In this case, defendants, by their own admissions, jointly conspired to slander Geller and actively participated in each instance of defamation that was committed against him. Just prior to admitting that the motivation behind the letter sent by the defendants to the Israeli tax authorities was to "get even" with Geller, defendant Shar indicated that she and her daughter had always written letters together and did so here. T86-3 to T87-17, 8/12/93, Vol. 1. Likewise, defendant Ziemke repeatedly testified during trial that the defamatory communications were made by both defendants. T66-3 to T66-12, 8/9/93, Vol. 2. Therefore, unlike *Refuse & Env. Systems*, 932 F.2d at 40, cited by the petition, here, each of the acts complained of by the respondents was committed by the defendants in unison. The defendant mother and daughter in this case lived together, worked together, and acted together. During many years of discovery, the defendants did not object and actually encouraged the notion that when one of the principals of ITAS spoke or wrote, they were doing so on behalf of the other individual and the corporate entity. The defendants answered the complaint as one entity and made no effort to disassociate themselves from one another at any time during the course of the trial or their appeals.

> Defendants never argued to the jury that one [defendant] was less culpable than another. therefore, it cannot now be said that the form of the verdict sheet so affected [defendants'] substantial rights that a new trial is merited on that basis.

*Inter Medical Supplies Ltd., supra*, 975 F. Supp. at 698.

In light of the above, the Appellate Division correctly determined that "if it was error not to require individualized verdicts, that error was not, in the circumstances, plain error." *Almog, supra*, 298 N.J. Super at 161. The Appellate Division properly reasoned that:

> The evidence of defendants' intentional, malicious and egregious wrongdoing was overwhelming. The defendants moreover acted in concert and as a unit, each endorsing and cooperating in the other's actions.

> Indeed, most of the actions were joint. The three defendants were represented by a single attorney. There was no claim by any of the three against any of the others for indemnification or contribution. In these circumstances we are satisfied that the unitary verdict of joint liability without individualized verdicts as to each or allocation of responsibility among them was entirely appropriate. We note, moreover, that defendants did not object on this ground at trial to the judge's charge, which instructed the jury that they could find defendants individually liable or jointly and severally liable, or to the implementing interrogatories submitted to the jury.

*Id.* at 160-161.

**B. The Appellate Division Correctly Determined That The Jury Was Not Considered Advisory Under The Law.**

Defendants request this Court to determine whether New Jersey should be permitted to "elevate" an "advisory jury" verdict. Pet. 22-24. However, this Court should deny defendants' petition because the Appellate Division properly determined that the jury was not advisory under the law.

The term "advisory jury,"

> implies a jury known to the parties to be merely advisory at the time of trial (and, for the sake of efficiency, sufficiently in advance of trial that counsel may prepare a case appropriate to the trier of fact).

*Thompson v. Parkes*, 963 F.2d 885, 889 (6th Cir. 1992); *see also Bereda v. Pickering Creek Indus. Park, Inc.*, 865 F.2d 49 (3rd Cir. 1989); *Pradier v. Elespuru*, 641 F.2d 808 (9th Cir. 1981); *Hildebrand v. Bd. of Trustees Of Mich. S. Univ.*, 607 F.2d 705 (6th Cir. 1979). Thus, a true "advisory jury" occurs in "actions not triable of right [by a jury] . . . on motion or at the court's initiative," but only upon notice to the parties and the jury. *Thompson, supra*, 963 F.2d at 888 (citing Fed. R. Civ. P. 39(c)).

At the conclusion of a five-week trial in the present case, and out of the presence of the jury, the trial judge stated that he would decide this case sitting as an Israeli judge without a jury. He allowed

the jury to deliberate under New Jersey law, and to enter an opinion he later deemed "advisory." However, no mention was made of an advisory jury either prior to trial, or during trial, and the jury was never informed of its "advisory" role; thus the jury "returned its verdict upon due deliberation, and cognizant of its role as the final arbiter of the dispute." *Thompson*, *supra*, 963 F.2d at 890. "The proper course under these circumstances is to direct that judgment be entered based upon the jury's verdict." *Id.*

Accordingly, the Appellate Division properly held that "this jury never functioned as or was constituted or denominated as an advisory jury." *Almog*, *supra*, 298 N.J. Super. at 160. In support of its holding, the Appellate Division properly reasoned that:

> [issues of procedural due process] are obviously not . . . implicated here and defendants do not object to "elevation" of the jury verdict as a conceptual matter. The point, of course, is that it was not until the jury retired to deliberate, after summations and charge, that its status as the final arbiter was challenged. The lawyers proceeded tactically on the understanding that this was a jury trial, as did the court. Nor did the jurors have any inkling during their deliberations that their status was anything but that of ultimate finders of the facts . . . Thus, nothing to the contrary said by the trial judge entered into or affected or tainted the way the lawyers tried the case to the jury or the way the jury deliberated.

*Id.*

It is notable that the petition refers to the jury as being "advisory" in quotations only, does not dispute the Appellate Division's conclusion that this jury was not advisory, and does not present any law or facts to support that this jury was an advisory jury as that term is defined by the caselaw.

Thus, the Appellate Division properly reinstated the jury's verdict as the final judgment because the jury was not advisory under law.

**C. The Trial Court And Appellate Division Provided A Meaningful Review Of Punitive Damages Notwithstanding Defendants' Strategic Decision To Withhold Their Financial Information, And The Appellate Division Correctly Determined That Defendants Waived Their Right To Complain About The Amount Of Punitive Damages.**

The petition states that "the Due Process Clause of the Fourteenth Amendment requires that punitive damage awards be reviewed for reasonableness by both the trial and appellate courts," Pet. 24 (citing *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 420-21 (1994) and *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 470 (1993)), and accuses New Jersey of "attempt[ing] to sidestep this protection, thereby eliminating any meaningful review of punitive damage awards." Pet. 24.

Contrary to this ridiculous assertion, the trial court and Appellate Division provided a meaningful review of punitive damages notwithstanding defendants' failure to argue against the amount of the punitive damages verdict in the Appellate Division, and defendants' strategic decision to withhold their financial information and not participate in a proposed remittitur process. Geller App. 1a-5a. Thus, the Appellate Division correctly determined that defendants waived their right to complain about the amount of punitive damages. *Almog*, *supra*, 298 N.J. Super. at 161-162.

Defendants' overriding strategy before, during and after trial has been to provide less than full disclosure of their assets and wealth. Geller App. 1a-5a. Thus, the Appellate Division appropriately determined that defendants waived their right to complain about the punitive damage awards:

> Most significantly, however, following the jury's return of the punitive damages verdict, the trial judge, in an abundance of caution, afforded defendants an opportunity to demonstrate by way of discrete financial records any alleged excessiveness. Defendants failed in the end to take advantage of that opportunity. We are satisfied that they thereby waived their right to complain of the quantum.

*Id.* at 161-162. The petition may attempt to explain defendants' failure to provide their financial information by stating that the punitive damages verdict was not "operative" until the Appellate Division entered the jury verdict as the final judgment in the case. Pet. 6. However, despite defendants' initial acceptance of the trial court's offer to provide a court-appointed accountant to evaluate the alleged excessiveness of the punitive damage awards in relation to the defendants' assets, defendants suddenly changed their minds and voluntarily opted out of the process, and thereby waived their right to challenge the award. Geller App. 1a-5a.

**D. The Punitive Damages Were Commensurate With The Evidence Of Defendants' Wealth And The Malicious And Egregious Nature Of The Defendants' Acts.**

The petition also claims that the total damages imposed were so high as to make them unconstitutional under *TXO Production Corp. v. Alliance Resources*, *supra*. Pet. 24-29. However, in *TXO Production Corp.*, the Court did

> not consider the dramatic disparity between the actual damages [of $19,000] and the punitive award [of $10 million] controlling in a case of this character . . . The punitive damages award in this case is certainly large, but in light of the amount of money potentially at stake, the bad faith of petitioner . . . and petitioner's wealth, we are not persuaded that the award was so "grossly excessive" as to be beyond the power of the State to allow.

*Id.*, 509 U.S. at 462.

In addition, the petition states that "[j]udicial review of the size of punitive damages awards has been a safeguard against excessive verdicts for as long as punitive damages have been awarded," Pet. 18 (citing *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 421 (1994)), and that "defendants were deprived entirely of meaningful appellate review" in this case. Pet. 17-18, *see also*, Pet. 21-24. However, in *Honda Motor Co., Ltd.* the defendants were entirely deprived of judicial review because Oregon removed the procedural safeguard providing for judicial review of punitive damage awards; thus, this Court determined that such removal

violated the Due Process Clause of the Fourteenth Amendment. *Honda Motor Co., supra*, 512 U.S. at 432. Unlike the state of Oregon in *Honda Motor Co.*, here, even though "defendants [did] not challenge the amount of punitive damages allowed by the jury," the Appellate Division "carefully examined the evidence adduced at the punitive damages trial" and held that:

> the awards were commensurate with the evidence of defendants' wealth and represent, considering the egregious nature of the torts, an acceptable ratio between compensatory and punitive damages.

*Almog, supra*, 298 N.J. Super. at 161.

Finally, Geller's punitive damages award is permissible under *BMW Of North America, Inc. v. Gore*, 517 U.S. 559 (1996). In *BMW*, this Court provided guidelines to determine whether punitive damages are unconstitutionally excessive. *Id.* There, BMW had adopted a nationwide policy to limit disclosure of minor pre-sale repairs to new car purchasers. *Id.*, 517 U.S. at 562. This Court determined that BMW's "conduct was not sufficiently egregious to justify the severe punitive sanction imposed against it." *Id.*, 517 U.S. at 561.

In *BMW*, this Court initially considered the degree of reprehensibility of the defendants' conduct. *Id.*, 517 U.S. at 560. In reversing the $2 million punitive damages award, this Court found "no evidence either that BMW acted in bad faith . . . that BMW engaged in deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive." *Id.* In addition, this court noted that "repeated misconduct is more reprehensible than an individual instance of malfeasance," *Id.*, 517 U.S. at 577, and found "no evidence that BMW persisted in a course of conduct after it had been adjudged unlawful on even one occasion, let alone repeated occasions." *Id.*, 517 U.S. at 579.

Contrary to this Court's findings in *BMW*, the defendants' conduct in the present case was particularly egregious in that defendants exhibited bad faith, engaged in repeated deliberate false statements and affirmative acts of misconduct. Thus, the Appellate Division appropriately determined that

> defendants Shar and Ziemke and their company took concerted, malicious and purposeful action over a significant period of time to destroy both Almog and Geller as respected members of their community, that they did so with total disregard of the truth or of the personal consequences to them and their families, and that in large measure they succeeded.

*Almog*, *supra*, 298 N.J. Super. at 153.

While this Court has consistently refused to draw any mathematical line for excessiveness, the ratio of the punitive damages award to the compensatory award is an additional factor to consider. *BMW*, *supra*, 517 U.S. at 581. In *BMW*, the ratio between the plaintiff's punitive damages award and amount of actual harm as determined by the jury, was 500 to 1. In the present case, the ratio between Geller's punitive damages award and compensatory damage award as determined by the jury, was substantially less, at 25 to 1. In light of the reprehensibility of defendants' acts and the nature of the damage done to reputation, such a ratio is not unconstitutionally extreme.

> The Supreme Court of New Jersey has recognized that the reasonableness of the relationship of punitive damages to actual injury must be considered in light of other factors in each case. *Fischer v. Johns-Manville Corp.*, 103 N.J. 643, 673, 512 A.2d 466 (1986). As that court noted, "particularly egregious conduct may generate only minimal compensatory damages." *Id.* When that happens, "higher punitive damages would be justified than when substantial compensatory damages are awarded." *Id.*

*Inter Medical Supplies Ltd.*, *supra*, 975 F. Supp. at 701. "Therefore, one naturally expects a much lower ratio when a substantial award of compensatory damages has been made." *Id.* (citing *BMW*, *supra*, 517 U.S. at 582 ("low awards of compensatory damages may properly support a higher ratio than high compensatory awards").

Moreover, "[i]n New Jersey, the purpose of an award of punitive damages is to punish the defendant and to deter that defendant from repeating such conduct." *Inter Medical Supplies*

*Ltd.*, *supra*, 975 F. Supp. at 695. Given the significant wealth of the defendants and egregiousness of their tortious conduct, only a high punitive damages verdict could effectively punish these defendants and deter them from repeating similar harmful conduct.

It is also reasonable to assume that the jury fully appreciated the inherent difficulty in assessing compensatory damages in the travel and tourism business, and was aware that a defamation plaintiff may have no way to precisely determine the extent of his reputation damages and lost business opportunities.

An additional consideration stated in *BMW* is the difference between the punitive damages award "and the civil or criminal sanctions that could be imposed for comparable misconduct." *BMW*, *supra*, 517 U.S. at 583. The petition addresses this consideration by referring to the New Jersey Punitive Damages Act, N.J. Stat. Ann. § 2A:15-5.9 *et seq.* (West 1998). Pet. 30. However, the petition accurately states that this Act was enacted long after the lawsuit in the present case was filed, and, therefore, does not apply. Pet. 30.

Thus, the trial court and Appellate Division provided a meaningful review of punitive damages, notwithstanding defendants' strategic decision to withhold their financial information and refusal to participate in a remittitur process, and the Appellate Division correctly determined that defendants waived their right to complain about the amount of punitive damages.

Therefore, this Court must deny defendants' petition because the Appellate Division's determination regarding defendants' due process rights is a plainly correct application of settled law that does not present any conflicts warranting review by this Court.

## CONCLUSION

In view of the foregoing, it is respectfully requested that this Court deny defendants' petition for a writ of certiorari.

Respectfully submitted,

ANDREW S. BERNS*
PHILOMENA A. McARTHUR
LAMPF, LIPKIND, PRUPIS,
PETIGROW & LABUE
A Professional Corporation
*Attorneys for Respondent*
*Ben Ami Geller*
80 Main Street
West Orange, New Jersey 07052
(973) 325-2100

* *Counsel of Record*

# APPENDIX

**APPENDIX A — CORRESPONDENCE DATED JANUARY 29, 1997 FROM ANDREW S. BERNS, ESQ., SENT IN RESPONSE TO A REQUEST FROM THE HONORABLE SYLVIA B. PRESSLER, P.J.A.D., AFTER ORAL ARGUMENT IN THE APPELLATE DIVISION, REGARDING DEFENDANTS' HISTORY OF REFUSALS TO DISCLOSE THEIR FINANCIAL INFORMATION**

**LAMPF, LIPKIND, PRUPIS, PETIGROW & LaBUE**
**A PROFESSIONAL CORPORATION**
**ATTORNEYS AT LAW**
**80 MAIN STREET**
**WEST ORANGE, NEW JERSEY**

* * *

5142-1

January 29, 1997

*Via Lawyers Service*
Honorable Sylvia B. Pressler, P.J.A.D.
Superior Court of New Jersey
Appellate Division
Court Plaza N.
25 Main Street, 5th Floor
Hackensack, New Jersey 07601

Honorable Barbara Wecker, J.A.D.
Superior Court of New Jersey
Appellate Division
1101 North Tower
158 Headquarters Plaza
Morristown, New Jersey 07960

*Appendix A*

Honorable Burrell I. Humphreys, J.A.D.
Superior Court of New Jersey
Appellate Division
1101 North Tower
158 Headquarters Plaza
Morristown, New Jersey 07960

Re: **Almog v. ITAS, et al.**
***Docket No. A-1679-93-T3***

Dear Honorable Judges of the Appellate Division:

Pursuant to the Court's instruction subsequent to the oral argument of this matter on January 28, 1997, enclosed please find the post-trial motion transcript of November 19, 1993. The November 19, 1993 transcripts address the defendants' post-trial motions below for a new trial pursuant to *R.* 4:50-1. The Court will note that I have included the complete transcript of this date's argument which includes two volumes. The Court will further note that the November 19, 1993 transcript was originally included in plaintiffs' Appendix at Pa604. Unfortunately, upon review, Pa604 includes only a portion of the transcript and accordingly I am now supplying the Court with the complete underlying record from below.

Additionally, at oral argument, the Court expressed interest in the trial court's handling of issues associated with a possible remitter in the evaluation of the jury's punitive damage award. The procedural history of these events is all contained in the record below and I am including in this package copies of said documents for the Court's convenience in evaluating this issue. The additional documents are as follows:

*Appendix A*

1. Da598 through Da606 is an unabridged copy of Point XXIII from defendants' Motion for a new trial which sets forth the defendants' sole basis of objection to the punitive damages from the jury verdict below. The Motion for a new trial was filed on or about October 18, 1993 and was argued before the Court on November 19, 1993.

2. Pa130-131, correspondence from the Honorable Douglas T. Hague dated October 1, 1993. This correspondence constituted the Court's offer to appoint a court-appointed accountant to assist the Court in an evaluation of the jury's punitive damage award.

3. Pa205-206, correspondence dated October 8, 1993 from defendants' trial counsel to Judge Hague accepting the Court's proposal for a court-appointed accountant.

4. Pa137, correspondence dated February 23, 1994 from Judge Hague to all trial counsel describing the court-appointed accountant's inability to gain the cooperation of defendants and their accountants in evaluating the punitive damages award.

5. Pa138-140, correspondence from defendants' appellate counsel, H. Neil Broder to Judge Schwartz explaining the defendants' position with respect to the court-appointed accountant and identifying that it is the defendants' position that an advisory jury verdict can never become operative and that the defendants have chosen to appeal this issue directly to the Appellate Division.

6. Da887-888, the trial court's Order of January 14, 1994, denying defendants' Motion for an Order granting a new trial or for judgment notwithstanding the verdict.

*Appendix A*

The trial court found at the November 19, 1993 hearing that when the jury made its punitive damage award it "was acting, and properly so, on evidence and had the right to conclude that the constant obstruction on the part of the defendants was sufficient for them — that is the jury to draw an adverse inference on the — the worth of the corporate and individual defendants." (November 19, 1993, transcript 6:1-6). Thus, the trial court preliminarily found that the jury's punitive damage award was supported by sufficient evidence.

Despite this finding, the trial court offered to appoint an accountant at the defendants' expense to give the defendants a chance to provide the trial court with the financial and economic information that the defendants contumaciously withheld from the plaintiffs, crossclaimant and the jury during the punitive damages phase of the trial. The trial court thus invited the defendants to show that the punitive damage award was excessive — that the award would destroy rather than just punish the defendants. The trial court went so far on November 19 as to defer any ruling directly on the issue of punitive damages until the court-appointed accountant had a chance to make a report to the Court. *See*, November 19, 1993, transcript at 49-17 to 19.

The defendants, however, refused to provide the accountant with any information and subsequently declined the trial court's invitation to revisit the punitive damage award. Thus, the defendants tactically chose to withhold from the trial court and its accountant any new information necessary to determine a remitter and abandoned the procedure offered by the Court to review the punitive damage award. The defendants do *not* here appeal from any adverse ruling by the trial court as to any post-trial motion going to the punitive damage award. It is

respectfully submitted that the defendants have no basis for seeking redress at this juncture in the Appellate Division. This Court should reasonably infer that the defendants made a tactical decision that such disclosure would have not been helpful in obtaining a remitter.

I have enclosed the above information at the Court's request and to resolve what appeared to me to be some procedural confusion at the time of the oral argument. If the Court believes that the presentation of this information should be presented in a formal Motion, please advise.

Respectfully submitted,

s/ Andrew S. Berns
ANDREW S. BERNS

ASB/amm
Enclosures
cc: David Feinsilver, Esq. (via lawyers service)
H. Neil Broder, Esq. (via lawyers service)

Supreme Court, U.S.
FILED
JUL 27 1998
OFFICE OF THE CLERK

No. 97-1910

In The

# Supreme Court of the United States

October Term, 1997

MARILYN ZIEMKE, CELIA SHAR and ISRAEL TRAVEL ADVISORY SERVICE, INC.,

*Petitioners,*

*vs.*

SHALOM ALMOG, IRIT ALMOG and BEN AMI GELLER,

*Respondents.*

*On Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division*

## BRIEF IN OPPOSITION FOR RESPONDENTS SHALOM ALMOG AND IRIT ALMOG

DAVID FEINSILVER
*Counsel of Record*
THE FEINSILVER LAW GROUP, P.C.
*Attorneys for Respondents Shalom Almog and Irit Almog*
215 Millburn Avenue
P.O. Box 312
Millburn, New Jersey 07041
(973) 376-4400

*On the Brief:*

DAVID FEINSILVER
JAIME R. PLACEK
DANIEL V. SOLLECITO

147580

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, Inc.

36 pp

## QUESTIONS PRESENTED FOR REVIEW

Respondents Shalom and Irit Almog respectfully submit that, when the hyperbole is stripped from the Petition, the real issues presented are:

I. Whether there is *not* a First Amendment concern, where the defamation arises in the context of private commercial speech that was uttered maliciously for the sole purpose of injuring potential trade rivals, and where no media coverage, public official or public figure is involved?

II. Whether the Petition should be denied where the Petitioners failed to raise before the New Jersey Appellate Division the issue of whether the punitive damages verdict violated the free speech clause of the First Amendment?

III. Should this Court entertain a Petition predicated upon an assertion that a punitive damage award was excessive in light of their alleged financial condition, where the Petitioners did not challenge the quantum of the punitive damage award before the New Jersey Appellate Division and steadfastly refused below to furnish the jury and the Court with the necessary financial records and information to determine the issue?

IV. Did the New Jersey Appellate Division properly determine that the New Jersey law applied to this private defamation suit where New Jersey's interest in deterring egregious and tortious conduct of its citizens is not outweighed by any substantial Israeli interests?

V. Did the New Jersey Appellate Division correctly determine that the jury charge and jury interrogatories, which permitted individual allocations of liability but did not

require them, were not plainly erroneous, where Petitioners presented themselves as one "unit", jointly conspired to defame respondents, presented one unified defense through one law firm, furnished the jury with no information to enable it to make an allocation, and failed to object thereto?

VI. Did the New Jersey Appellate Division properly determine that the jury was not advisory, where the lawyers proceeded tactically on the understanding that this was a jury trial, as did the court; the jurors had no idea during their deliberations (or at any other time) that their status was anything but that of the ultimate finders of the facts, and nothing said by the trial judge tainted the way that the lawyers tried the case to the jury, or the way that the jury deliberated?

## TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented for Review | i |
| Table of Contents | iii |
| Table of Citations | v |
| Statement of the Case | 1 |
| Background | 1 |
| Reasons for Denying the Writ | 9 |
| I. Where Defamation Arises In The Context Of Private Commercial Speech, Uttered Maliciously For The Sole Purpose Of Injuring Potential Trade Rivals, And Where No Media Coverage, Public Official Or Public Figure Is Involved, No Possible First Amendment Concerns Are Implicated, Nor Does The Imposition Of Punitive Damages Under State Law In Such A Case Raise Any Unique Due Process Or Other Constitutional Concerns. | 9 |
| A. The First Amendment In The Ordinary Non-Media, Non-Public Interest Case. | 9 |
| B. The Constitutionality Of Punitive Damages As Imposed By State Law In Non-Media, Non-Public Interest Defamation Cases, And Generally. | 14 |

*Contents*

*Page*

C. The New Jersey Courts In This Matter Consistently Applied New Jersey's Own Choice Of Law Rules In Concluding That New Jersey Law Should Be Applied On The Question Of Punitive Damages. That Choice Of Law In No Way Violates Petitioners' First Amendment Or Due Process Rights. .... 17

II. Petitioners Had A Full Jury Trial Below Which Resulted In A Verdict, And Although The Trial Judge Elected Not To Enter Judgment On That Verdict, The Appellate Division Reversed Him And, After Review, Reinstated The Verdict And Directed That Judgment Be Entered On It. Petitioners Suffered No Denial Of Due Process In This Procedure, Nor On The Basis Of Any Of The Other Matters Raised In The Petition. .... 20

Based On The Unique Facts Presented Herein, It Was Not Violative Of Due Process For The Trial Court Not To Require Individualized Determinations From The Jury As To The Liability And Damages Attributable To Each Defendant. ..... 22

III. To The Extent That Concepts Of Substantive Due Process Under The Fourteenth Amendment Can Have Any Possible Application To A Civil Tort Judgment In State Court, No Known Due Process Rights Of Defendants Were Violated In The Proceedings Below. ..... 24

*Contents*


| | Page |
|---|---|
| A. Degree of Reprehensibility ..... | 24 |
| B. Ratio ..... | 27 |
| C. Comparative Legislative Sanctions ..... | 27 |
| Conclusion ..... | 28 |


## TABLE OF CITATIONS

**Cases Cited:**


*Abebe-Jira v. Negewo*, 72 F.3d 844 (11th. Cir. 1996) . 25

*Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986) ... 12, 13

*Almog v. ITAS*, 298 N.J. Super. 145 (App. Div. 1997) ..... 1, 5, 8, 17, 18, 19, 22, 25

*Bereda v. Pickering Creek Industrial Park, Inc.*, 865 F.2d 49 (3rd Cir. 1989) ..... 21

*Colley v. Harvey Cedars Marina et al.* 422 F. Supp. 953 (D.N.J. 1976, footnote omitted) ..... 19

*Corporate Training Unlimited, Inc. v. National Broadcasting Co., Inc.*, 981 F. Supp. 112 (E.D. N.Y. 1997) ..... 11

*Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749 (1985) ..... 9, 10, 11

*Contents*


*Page*

*Filartiga v. Pena-Irala*, 577 F. Supp. 860 (E.D. N.Y.) ..... 25

*Food Lion, Inc. v. Capital Cities/ABC, Inc., et al.*, 984 F. Supp. 923 (M.D. N.C. 1997) ..... 11

*Gantes v. Kason Corp.*, 145 N.J. 478 (1996) ..... 18, 19

*Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) ... 9, 10, 12

*Honda Motor Co. Ltd. v. Oberg*, __ U.S.__, 114 S. Ct. 2331 (1994) ..... 16

*J.S. and M.S. v. R.T.H. and R.G.H.*, 301 N.J. 150, 693 A.2d 1191 (N.J. App. 1997) ..... 25

*New York Times v. Sullivan*, 376 U.S. 254 (1964) .... 9, 10

*Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991) ..... 14, 15, 16

*Philadelphia Newspapers, Inc. v. Hepps et al.*, 475 U.S. 767, 89 L. Ed. 783, 106 S. Ct. 1558 (1986) ..... 10

*Refuse & Env. Systems v. Industrial Serv. of Am.*, 932 F.2d 37 (1st Cir. 1991) ..... 23, 24

*Rosenbloom v. Metromedia*, 403 U.S. 29 (1971) ..... 13, 14

*Thompson v. Parks*, 963 F.2d 885 (6th Cir. 1992) .... 21

*Contents*


| | Page |
|---|---|
| *TXO Productions Corp. v. Alliance Resourses Corp.*, 509 U.S. 433, 113 S. Ct. 2711 (1993) | 15, 16 |
| *Waters v. Churchill*, 511 U.S. 661, 128 L. Ed. 686, 114 S. Ct. 1878 (1994) | 10 |
| *Wilson v. Savino*, 10 N.J. 11, 89 A.2d 399 (1952) | 24 |
| *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) | 25 |
| **Statutes Cited:** | |
| N.J. Stat. Ann 2A:15-5.9 *et seq.* (West 1998) | 27 |
| N.J. Stat. Ann. 2A:15-5.14(a) | 27 |
| **United States Constitution Cited:** | |
| First Amendment | i, 9, 10 |
| Fourteenth Amendment | 24 |
| **Rule Cited:** | |
| N.J. Rule of Court 1:9-2 | 5 |
| **Other Authorities Cited:** | |
| New Jersey Practice, Vol. 24 § 742, 2nd edition | 27 |
| Restatement (second) Chapter 25 | 21 |

## STATEMENT OF THE CASE[1]

The factual recitations set forth in the Petitioners' Statement of the Case bears very little resemblance to the truth, or to the record herein. Due to space limitations, Respondents refer this Court to the factual recitation set forth at pages 149 through 155 of the February 25, 1997 opinion[2] rendered by the Superior Court of New Jersey, Appellate Division (the Honorable Sylvia B. Pressler, P.J.A.D. writing for a unanimous Court), which recitation was predicated upon that Court's careful review of the entire record below.

## BACKGROUND

As a result of a 1993 Jury verdict arising out of a 5 1/2 week trial in a lawsuit filed on October 8, 1989, Shalom Almog, Irit Almog and Ben Ami Geller (hereinafter, the "respondents") hold a judgment in defamation against Celia Shar, her adult daughter, Marilyn Ziemke, and their wholly owned Corporation, Israel Travel Advisory Service, Inc., ("ITAS"). The jury awarded the Almogs compensatory damages of $1,524,000 and $4,500,000 in punitive damages for a total of $6,024,000; and awarded Geller $40,000 in compensatory damages and $1,000,000 in punitive damages. Pursuant to special interrogatories, the jury expressly found that the defamatory statements were made by the Petitioners with actual knowledge that the statements were false.

---

1. Citations to the record below will be in the following form: "Pet.#" refers to defendants' petition for a writ of certiorari to this Court; "Da#" refers to a page in defendants' Appendix to their brief filed in the Superior Court of New Jersey, Appellate Division; "Pa#" refers to a page in the Almog Respondents' Appendix to their brief filed in the Superior Court of New Jersey, Appellate Division; "Raa#" refers to a page in the Almog Respondents' Appendix to their Brief filed with the Supreme Court of New Jersey; "Tr.#" refers to the trial transcript.

2. *Almog v. ITAS*, 298 N.J. Super. 145 (App. Div. 1997).

Contrary to petitioners' assertion that an accounting firm substantiated their claims made against Respondent Almog for alleged misappropriation of monies, petitioners never provided any evidence to support such a claim.

Respondents Shalom and Irit Almog did not file suit in the New Jersey Court to preempt a potential suit by the petitioners in Israel. On November 23, 1989, the petitioners filed a retaliatory sham lawsuit in Israel against Mr. Almog seeking $550,000 in damages for fraud, embezzlement, misrepresentation and negligence, which was enjoined.[3] These Respondents dismissed their claims against Respondent Geller, as the same were not proven at trial.

Petitioners Shar and Ziemke, New Jersey residents working through Petitioner ITAS, are in the business of organizing tours to Israel for American travelers. During the period in controversy, the business was highly successful, ITAS, controlled 30% of the Untied States' Bar-Bat Mitzvah market.[4] ITAS subcontracts all the Israeli arrangements-hotels, meals, sightseeing, entertainment, transportation, and the like-to a licensed Israeli land tour operator. The groups are then conducted by a licensed Israeli tour guide acting as an independent contractor under arrangement with the land tour operator. Geller, who worked as a guide, frequently guided ITAS groups.

Sometime in 1984 Geller solicited Almog, then a colonel in the Israeli Defense Forces, to enter the travel business upon his

---

3. Petitioners brought the same claim against Mr. Almog by way of counterclaim. However, Petitioners solely offered proofs with respect to one $39,000 transaction and limited their counterclaim thereto at the conclusion of the case (Raa60[21]-62[16]). Both the jury and the trial court found in favor of Mr. Almog on Petitioners' counterclaim. The sham alleged Israeli accounting report which was the basis for said suit was never produced or made part of the record herein. The Appellate Division ordered the Petitioners to delete all references thereto (Pa183).

4. At trial it was established that ITAS' tax returns bore no relation to reality.

retirement from the army and introduced him to Shar and Ziemke. In August 1985, when Almog retired from the army, he worked for the land tour operators assigned exclusively to the ITAS account. A close working relationship developed between Almog and Shar and Ziemke, who were extremely pleased with his performance.

In October 1988, the land tour operator and Geller advised the Petitioners that they believed that Almog charged ITAS for some services not actually rendered the touring groups and by not remitting certain rebates; i.e. relatively minor matters involving the cost of box lunches, the use of hostesses, the quality of buses engaged, and a small hotel prepayment discount. However, Almog's disposition of these matters was perfectly proper and in accord with industry standards and practices.

In any event, the Petitioners created *their own* allegations of wrong doing, which took on a life of their own, and increased in magnitude with the passage of time, accusing him of embezzling sums up to $500,000; calling him an embezzler, thief, schizophrenic and adulterer, etc., (all without any basis in fact). As a result, Almog was unable to find employment either in the tourist industry or in any other industry in Israel because of the savage campaign of slander and libel that Shar and Ziemke maliciously undertook against him, both in the United States and in Israel. It was not until 1990 that Almog was finally able to find work at a greatly reduced salary as a plant manager in the Dominican Republic. They published these stories to anyone who would listen, including Almog's former commanding officer, who advised him to leave Israel as his reputation and prospects were finished there. The Almogs suffered substantial physical and emotional harm as a result of Petitioners' actions.

Geller continued in Petitioners' good graces until the summer of 1990, when Geller was hospitalized after suffering a stroke. When he was released from the hospital, he entered into an agreement with a land tour operator when he was not required to work exclusively on ITAS tours and his per-tourist fee was increased

to $15. When the land tour operator's principal advised Shar and Ziemke of this agreement, they became enraged, vowed to "punish" Geller, called him a thief and refused to permit him to guide the tour scheduled for October. The land tour operator thereupon severed its relationship with ITAS and entered into a relationship with an American competitor of ITAS and Geller continued to work both for the land tour operator and other companies. The Petitioners mounted a retaliatory defamatory campaign against Geller, accusing him of having seduced the daughter of a major Israeli restaurant owner and causing Geller and his wife to be subject to criminal investigation by the Israeli tax authorities, and to suffer impairment of reputation, and emotional distress.

The Honorable Douglas Hague, J.S.C., who presided over the trial found:

> I find that the conduct of the defendants . . . was outrageous . . . I think it was vicious: I think it was unnecessary . . . I think that they defamed, outrageously, these two plaintiffs . . . I find it to be a fact that the defendants also — unnecessarily impugned his private life with no reason and no necessity to do it — it had nothing to do with their business — by indicating that he had affairs with other women . . . insofar as the Colonel is concerned . . . somehow along the line they became disoriented. Somehow along the line their zeal became misguiding — misguided and I think that their actions thereafter were unwarranted, violent and vicious, and they conducted some . . . indiscriminate broadsides against Colonel Almog . . . I think that the damage to his reputation . . . was stupendous — was terrible. And the word that I'm searching for, I think, is odious.

(Tr. 8/13/93 112:15-115:7)

The Hon. Sylvia Pressler, P.J.A.D., writing for a unanimous panel of the Appellate Division, stated:

> In summary, we are satisfied from our review of this record that the jury had an ample evidential basis from which to conclude that defendants Shar and Ziemke and their company took *concerted, malicious and purposeful action* over a significant period of time to destroy both Almog and Geller as respected members of their community, that they did so with *total disregard* of the truth or of the personal consequences to them and their families, and that in large measure they succeeded. (Emphasis added).

The Appellate Division of the Superior Court of New Jersey further found that the "evidence of defendants' intentional, malicious and egregious wrongdoing was overwhelming" *Almog v. Itas*, 298 N.J. Super 145 at 153, 160 (App. Div. 1997).

The compensatory damages phase of the trial commenced on July 12, 1993, with closing arguments on August 13, 1993. On August 16, 1993, the jury answered special interrogatories consented as to form by defendants' counsel (Da 461 *et seq.*). The jury determined that punitive damages should be awarded. Due to the trial court's vacation schedule, the trial court, with the consent of the parties and jury, suspended the trial until September 20, 1993, at which time the trial reconvened for the second (punitive damage) phase (conducted on September 20 and 21, 1993).

On August 16, 1993, following the jury's initial verdict, the trial court, *inter alia*, ordered the petitioners to furnish respondents' counsel with all of the petitioners' 1991 and 1992 personal and corporate tax returns (Raa 74[4-7]). On August 17, 1993, respondents served upon defense trial counsel notices to produce in lieu of a subpoena pursuant to N.J. Rule of Court 1:9-2. When documents were not timely received, respondents moved to compel production thereof.

On September 16, 1993, the trial court ordered the petitioners to produce 1991, 1992 and 1993 profit and loss statements for petitioner ITAS; ordered that the personal 1991 and 1992 tax returns of petitioners Shar and Ziemke be produced; and cautioned petitioners' trial counsel that the petitioners' non-production of financial information might result in a large verdict.[5] (*See, generally*, Raa 75[9]-110[4]). Petitioners' trial counsel represented to the court on September 16, 1993, *inter alia*, that petitioners' accountant (Leonard Harris, C.P.A., who was noticed by the respondents to appear at trial) would appear for trial[6] (Raa 107[15-17]).

In contrast to Petitioners' description of the trial, Judge Hague took considerable time and care in explaining to the jury the reason for the few brief interruptions during the 5 1/2 week trial, which did not affect the outcome herein.

Contrary to the false assertion that Judge Hague stated on August 13, 1993 (while charging the jury) that he had in fact only listened with ". . . half an ear . . .", what Judge Hague actually said was:

> As I told you before, you have eight minds and 16 eyes and you see much more than I could ever hope to see in this case . . . and I think that because of my over three decades of experience as a trial attorney, *I can listen* with half an ear, but I can't do it as well as you can . . .

Raa 66[19]-67[7]. Clearly, Judge Hague was merely stressing to the jury the importance of their role, and expressing his confidence in them to reach a proper verdict. Judge Hague never left the

---

5. *See* resume of petitioners' failures to produce court ordered documents and information. (Pa178).

6. However, contrary to petitioners' representation, petitioners did not produce their accountant, claiming that he was on vacation and would not be returning until after trial. Raa 131[13]-133[10].

courtroom during proceedings, nor was he interrupted by another matter, as all counsel *out of respect for the Court*, immediately *stopped* and *refused* to continue until the interruption was over. At *no* time did the trial proceed without the Judge, or without the Judge's attention.[7]

Contrary to the petitioners' assertions, this was not an advisory jury as the jury had already begun deliberations in the jury room when the trial judge announced to trial counsel (emphasizing to counsel that this was to remain in the courtroom) that he would decide the case as an Israeli Judge — as the petitioners had requested.

With regard to petitioners' complaint that they were treated as one by the trial court, petitioners were, and are, truly inseparable. Based on the unique facts presented at the trial below, individual determinations of guilt were *not* required (and would have served no purpose).[8] Petitioners Shar and Ziemke (Shar's only child), who continue to reside in the same home and who are the sole principals of ITAS: (a) wrote every libelous letter jointly; (b) jointly participated in every meeting where they slandered Mr. Almog; (c) jointly conducted all aspects of their business; (d) conducted every slanderous phone conversation jointly[9]; and (e) are truly inseparable. (Raa 37[13-25]). In fact, the testimony (which was largely uncontradicted, and found to be credible and overwhelming by the jury, trial judge and Appellate Division), was that *both* petitioner Shar and petitioner Ziemke, in *each instance*, actively

---

7. Petitioners' present counsel was not petitioners' trial counsel, while respondents' present counsel was also trial counsel in this matter.

8. Furthermore, petitioners offer no authority (governing at the time of trial) for their proposition that when an award is made jointly and severally against defendants, the *individual* financial circumstances of each defendant must be taken into account.

9. Petitioner Shar testified that the petitioners participated jointly in writing letters and making telephone calls. Raa 56[3]-57[17].

participated in the defamatory statements.[10] Therefore, the trial court properly denied the petitioners' *untimely* request to split them into three individual defendants for the purpose of determining liability.[11] As noted by the trial court, the entire case was presented by *one* law firm on behalf of all three defendants; they operated as one unit, and *the petitioners presented no evidence to the jury to enable it to make an allocation*; and that he did not believe that *under the circumstances* that there should be separate punitive damage awards. Nevertheless, the court *did* draft special interrogatories for the jury to decide whether there should be individual assessments or a joint award (Raa 69[13-17]; Raa 112; Raa 166[20]-168[14]). The *jurors found that the defendants had indeed acted jointly*,[12] and awarded punitive damages against the petitioners jointly.[13]

Finally, contrary to petitioners' assertion, the United States Bankruptcy Court for the District of New Jersey in *not* "awaiting the response of this court before acting further".[14] ITAS has not filed for bankruptcy, and continues as a profitable business.

---

10. *See, e.g.*, the testimony of Tommy Haendler, Pamela Cohen, Benny Sivan and Ben Ami Geller (Raa 19[7]-20[4], Raa 20[9]-21[20]; Raa 10[5]-15[6]; Raa 24[1]-34[6]).

11. Judge Hague *did* instruct the jury that they could either find the petitioners individually liable or jointly and severally liable (Raa 172[10]-173[3]).

12. A review of the transcript reflects that both respondents' and petitioners' trial counsel, as well as the Court, worked from *petitioners'* proposed interrogatories until a final joint submission was reached. Raa 173.

13. As noted by the Appellate Division, the petitioners have recourse available through claims for contribution or indemnification. *Almog*, at 161.

14. The respondents are preparing a motion to dismiss the bankruptcy petition, as a bad faith filing, in what is essentially a one creditor case, filed after exhaustion of state court remedies.

## REASONS FOR DENYING THE WRIT

### I. WHERE DEFAMATION ARISES IN THE CONTEXT OF PRIVATE COMMERCIAL SPEECH, UTTERED MALICIOUSLY FOR THE SOLE PURPOSE OF INJURING POTENTIAL TRADE RIVALS, AND WHERE NO MEDIA COVERAGE, PUBLIC OFFICIAL OR PUBLIC FIGURE IS INVOLVED, NO POSSIBLE FIRST AMENDMENT CONCERNS ARE IMPLICATED, NOR DOES THE IMPOSITION OF PUNITIVE DAMAGES UNDER STATE LAW IN SUCH A CASE RAISE ANY UNIQUE DUE PROCESS OR OTHER CONSTITUTIONAL CONCERNS.

#### A. The First Amendment In The Ordinary Non-Media, Non-Public Interest Case.

Petitioners cite, without much focus, cases such as *New York Times v. Sullivan*, 376 U.S. 254 (1964) and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and invoke sweeping generalizations as to free speech and public policy, none of which are applicable. *New York Times*, *supra*, *Gertz*, *supra*, and similar cases, involve newspapers or other public media, or public officials, or matters of public concern, or both. In *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749 (1985) the Court's holding made clear that absent such public concerns, there were no First Amendment limitations on the ordinary common law concepts of libel and slander, including the awarding of punitive damages when appropriate:

> We conclude that permitting recovery of presumed and punitive damages in defamation cases absent a showing of "actual malice" does not violate the First Amendment when the defamatory statements do not involve matters of public concern. Accordingly, we affirm the judgment of the Vermont Supreme Court.

*Id.* 472 U.S. at 763.

Although the main opinion by Powell, J. in *Dun & Bradstreet*, is correctly referred to as a plurality opinion, the two Justices who concurred in the result, would have restricted the application of the First Amendment in non-media cases even more severely than the plurality opinion. Burger, C.J., 472 U.S. at 749-64, and White, J., 472 U.S. at 765-74. Both of the concurring opinions argue, *inter alia,* for the total reversal of the *Gertz* requirement for proof of actual malice, and its prohibition against punitive damages, in media and "public figure" cases. (*e.g.* Justice White: "First, I am unreconciled to the *Gertz* holding and believe it should be overruled. Second, as Justice Powell [plurality opinion] indicates, '. . . the defamatory publication in this case does not deal with a matter of public importance.' Consequently, I concur in the Court's judgment." *Id.* 472 U.S. at 774).

Thus a clear, solid, five justice majority of this Court was strongly opposed to extending First Amendment based restrictions to ordinary non-media, non-public figure, non-public official defamation cases. That ruling has neither been overruled, nor questioned, by any subsequent majority opinion of this Court. *e.g.*: *Philadelphia Newspapers, Inc. v. Hepps et al.*, 475 U.S. 767, 89 L. Ed. 783, 106 S. Ct. 1558 (1986), "In sharp contrast to *New York Times*, *Dun & Bradstreet* involved not only a private-figure plaintiff, but also speech of purely private concern." 472 U.S., at 751-752, 105 S. Ct., at 2941. A plurality of the Court in *Dun & Bradstreet* was convinced that, in a case with such a configuration of speech, ". . . the showing of actual malice needed to recover punitive damages under either *New York Times* or *Gertz* was unnecessary . . ." 475 U.S. at 774, 106 S. Ct. at 1562-63; *Waters v. Churchill*, 511 U.S. 661, 128 L. Ed. 686, 114 S. Ct. 1878 (1994), "Likewise, the possibility that defamation liability would chill even true speech has not led us to require an actual malice standard in all libel cases." 661 U.S. at 670, 114 S. Ct. at 1885, citing to *Dun & Bradstreet*.

*Dun & Bradstreet* continues to be cited for the lack of heightened First Amendment concerns in private, non-media

defamation cases in some of the most recently reported Federal District Court cases: *E.g. Food Lion, Inc. v. Capital Cities/ABC, Inc., et al.*, 984 F. Supp. 923, 932 (M.D. N.C. 1997):

> [i]n light of the reduced constitutional value of speech involving no matters of public concern, we hold that state interest adequately supports awards of presumed and punitive damages—even absent a showing of "actual malice."

(quoting *Dun & Bradstreet)*; *Corporate Training Unlimited, Inc. v. National Broadcasting Co., Inc.*, 981 F. Supp. 112, 118, n.2 (E.D. N.Y. 1997): "In cases not involving matters of public concern and therefore not implicating heightened First Amendment protections for defendants, a plaintiff need not prove 'actual malice'." (citing *Dun & Bradstreet).*

The petitioners here, and at the New Jersey Supreme Court, have never claimed, nor could they claim, that this was a media or public figure or public official case. In footnote 8 on page 13 of their petition, however, they make the bizarre claim that this is not a commercial speech case. All parties to this case were involved in the United States to Israel bar/bat Mitzvah tour business; all did business with each other, and all are competitors in some aspects of this business. The only conceivable reason the defamations were uttered was to injure potential (or actual) commercial rivals. There is considerable evidence that the defamations, and the dispute that lead up to them, arose totally in the context of the business dealings among all the parties to this action.

Petitioners, on page 9 of their brief state:

> This Court has held that in a defamation case, compensation for damage to reputation is the only legitimate governmental interest. *Gretz v. Welch, Inc.*, 418 U.S. 322, 349 (1974).

This statement so completely ignores the media versus private speech issue, as to be totally disingenuous, if not deliberately misleading. The Court in *Gertz* clearly stated at the outset:

> The principal issue in this case is whether a *newspaper or broadcaster* that publishes defamatory falsehoods about an individual who is neither a public official or a public figure may claim a constitutional privilege against liability for the injury inflicted by those statements.

*Gretz v. Welch, Inc.*, 418 U.S. 322, 332 (1974) (emphasis added). In its holding the Court again clearly indicated that it was dealing only with the media issue:

> We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a *publisher or broadcaster* of defamatory falsehoods injurious to a private individual. This approach provides a more equitable boundary between the competing concerns involved here. It recognizes the strength of the legitimate state interest in compensating individuals for wrongful injury to reputation, yet *shields the press and broadcast media* from the rigors of strict liability for defamation.

*Id.* 418 U.S. at 347-48 (emphasis added).

The petitioners next cite *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 818 (1986) for the proposition that "[t]his Court has recognized that constitutional challenges to punitive damages raise 'important issues' ". Petition, p. 10. The *Aetna* case involved a state statute penalizing the bad faith refusals of insurers to pay health claims. However, the Court in *Aetna* declined to pass on the propriety of punitive damages and the penalty imposed below under a new Alabama statute, as it had decided to vacate and remand

the judgment of the Alabama Supreme Court on procedural grounds[15]. A full quotation of the language referred to by petitioners (which appears at 475 U.S. 828-29 not at 475 U.S. 818) demonstrates that: (a) the language quoted is on its face clearly *dicta*; and (b) even as *dicta*, the Court did not intend to comment on the general Constitutional propriety of punitive damages in all cases, let alone punitive damages in defamation cases, but merely upon the unique issues raised by Alabama's new cause of action:

> Appellant also argues that the retrospective imposition of punitive damages under a new cause of action violates its rights under the Contracts Clause of Article I, s10; that a $3.5 million punitive damages award is impermissible under the Excessive Fines Clause of the Eighth Amendment; and that lack of sufficient standards governing punitive damages awards in Alabama violates the Due Process Clause of the Fourteenth Amendment . . . These arguments raise important issues which, in an appropriate setting, must be resolved; however, our disposition of the recusal-for-bias issue makes it unnecessary to reach them.

*Id.* 475 U.S. at 828-29.

Petitioners next refer to comments by two dissenters in *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971) in which, according to petitioners, ". . . two justices expressed disapproval with the status of punitive damages in defamation law." Not only was *Rosenbloom* obviously a media case, but both dissenting justices, Marshall and Stewart, J.J., expressly based their comments on *free press* concerns:

> And fear of the extensive awards that may be given under the doctrine [punitive damages] must

15. Finding that one of the Alabama Court's justices should have recused himself.

> necessarily produce the *impingement on freedom of the press* recognized in *New York Times*.

*Id.* 403 U.S. at 83; 91 S. Ct. at 1839;

> The only constitutional caveat should be that absolute or strict liability, like uncontrolled damages and private fines, cannot be used. . . . Clearly, is *inconsistent with concepts of freedom of the press*.

*Id.* 403 U.S. at 87; 91 S. Ct. at 1841 (footnotes omitted, emphasis added).

In a private suit involving no public issues, no public figure, press or other media, there simply is no free speech justification for a private defendant to falsely utter statements intending to damage another's commercial reputation, anymore than there would be a free speech interest in shouting "fire" in a crowded theater.

**B. The Constitutionality Of Punitive Damages As Imposed By State Law In Non-Media, Non-Public Interest Defamation Cases, And Generally.**

In *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), this Court again asserted its acceptance of the common law concept of punitive damages. The Court in *Pacific Mutual Life*, facing a due process challenge to a punitive damage award of $840,000 (added to a compensatory verdict of $200,000), held:

> In view of this consistent history [of punitive damage awards in the common law], we cannot say that the common-law method for assessing punitive damages is so inherently unfair as to deny due process and be per se unconstitutional.

Although Petitioners quote from the concurring opinion of Justice Scalia, they omitted that Justice's concluding comments on punitive damages at the final two paragraphs of that opinion:

> . . . But punitive damages assessed under common-law procedures are far from a fossil, or even an endangered species. They are (regrettably to many) vigorously alive. To effect their elimination may well be wise, but is not the role of the Due Process Clause. Its function is negative, not affirmative, and it carries no mandate for particular measures of reform.
>
> We have expended much ink upon the due-process implications of punitive damages, and the fact specific nature of the Court's opinion guarantees that we and other courts will expend much more. Since jury-assessed punitive damages are a part of our living tradition that dates back prior to 1868, *I would end the suspense and categorically affirm their validity.*

*Id.* 499 U.S. at 38.

The Court again reaffirmed its confidence in the concept of punitive damages in *TXO Productions Corp. v. Alliance Resourses Corp.*, 509 U.S. 433, 113 S. Ct. 2711 (1993), where it affirmed a judgment in which a compensatory damage award of $19,000 was accompanied by a punitive damage award of $10 million, noting, *inter alia*:

> Thus, both State Supreme Courts and this Court have eschewed an approach that concentrates entirely on the relationship between actual and punitive damages. It is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred.
>
> * * *

> We agree with TXO that the emphasis on the wealth of the wrongdoer increases the risk that the award may have been influenced by prejudice against large corporations. . . . We note, however, that in *Haslip* we referred to the "financial position" of the defendant as one factor that could be taken into account in assessing punitive damages. . . .

*Id.* at 113 S. Ct. 2711, 2721 and 2723.

*Honda Motor Co. Ltd. v. Oberg*, __ U.S.__, 114 S. Ct. 2331 (1994) essentially dealt with the narrow procedural issue of a state constitutional amendment purporting to cut-off judicial review of punitive damage awards in jury verdicts, which provision the Court struck as violative of due process. The Court expressly cited and quoted from *Haslip*, *supra*, and *TXO*, *supra*, reaffirming its general position that common law punitive damage verdicts are not violative of due process.

In this matter, the New Jersey Superior Court, Appellate Division, specifically reviewed the punitive damage awards herein, both as to reasonableness and due process:

> There is one last matter we address. Defendants have not challenged the quantum of punitive damages allowed by the jury. Nonetheless, and because of the [New Jersey] Supreme Court's expressed concern with runaway punitive damage verdicts *in Herman v. Sunshine Chemical Specialties, Inc.*, 133 N.J., 329, 338, 627 A.2d 101 (1993), we have carefully examined the awards were commensurate with the evidence of defendants' wealth and represent, considering the egregious nature of the torts, an acceptable ratio between compensatory and punitive damages. Most significantly, however, following the jury's return of the punitive damages verdict, the trial judge, in

> an abundance of caution, afforded defendants an opportunity to demonstrate by way of discrete financial records any alleged excessiveness. Defendants failed in the end to take advantage of that opportunity. We are satisfied that they thereby waived their right to complain of the quantum.[16]

*Almog v. Israeli Travel Service, Inc.*, 298 N.J. Super 145, 161, 704 A.2d 158, 161. It should be noted that the Appellate Division first made its own independent assessment as to the reasonableness of the awards in light of all the circumstances, and only then turned to the procedural question of petitioners' bad faith refusal to produce financial records to challenge the reasonableness of the awards.

**C. The New Jersey Courts In This Matter Consistently Applied New Jersey's Own Choice Of Law Rules In Concluding That New Jersey Law Should Be Applied On The Question Of Punitive Damages. That Choice Of Law In No Way Violates Petitioners' First Amendment Or Due Process Rights.**

At page 16, the petition concedes that the state court properly utilized the governmental interest test in determining the choice of law to be applied, yet fault the state court's application of the court's own public policy of deterrence:

> Defendants do not quarrel with New Jersey's use of the governmental interest test, and do not seek review by this Court of that state issue. Defendants do, however, contend that New Jersey's application of that test, and its explicit declaration that deterring

---

16. After consenting to the post judgment appointment of an accountant by the court (to report on the petitioners' actual financial condition), the petitioners refused to furnish the financial records requested by the accountant, and chose to abandon remittitur considerations.

> speech is the overriding state interest, collides with the First Amendment and, therefore, demands the intervention of this Court.

The Appellate Division logically applied New Jersey's equally logical and Constitutionally sound choice of law rules and came to the conclusion that under New Jersey's choice of law rules New Jersey law should be applied on these facts:

> First as to choice of law. As we have noted, egregious misconduct was committed in New Jersey, elsewhere in the United States, and in Israel by New Jersey residents. Malicious defamation was published in and from this State. Key events occurred in New Jersey, including the two fateful meetings in Livingston we have already described. Underlying contracts and agreements were made here. A fuller remedy is available to the victims under New Jersey law than in Israel in respect of the scope of damages. The question is whether these significant contacts with New Jersey weight the application of the governmental interest test in favor of New Jersey law or Israeli law. We have no doubt in light of the totality of the circumstances that New Jersey's interest in the controversy as a whole is paramount to Israel's.

*Almog v. Israel Travel Advisory Service, Inc.*, 298 N.J. Super. 145, 158 (App. Div. 1997). Clearly many facts and circumstances, contacts and interests, were taken into account by the Appellate Division in reaching its choice of law decision.

*Gantes v. Kason Corp.*, 145 N.J. 478 (1996) is the case principally cited by the Appellate Division in coming to its choice of Law decision. *Almog*, *supra* 298 N.J. Super. at 158. In *Gantes*, Georgia's ten year statute of repose in products liability cases would have prevented Georgia plaintiffs from recovering for a recent injury caused by a machine manufactured in New Jersey more than ten

years ago. In allowing the Georgia resident who suffered injuries in Georgia to sue in New Jersey, the New Jersey Supreme Court in *Gantes* held that New Jersey has a legitimate interest in deterring tortious behavior of its citizens, whereas Georgia's policy (designed to cut off old claims against its manufacturers) is in no way compromised by New Jersey applying its more stringent rule against its own manufacturers, on behalf of a Georgia plaintiff. The *Gantes* Court noted that a state has no real governmental interest in seeing that its citizens do *not* recover for tortious conduct, but New Jersey, however, has a strong interest in deterring ". . . egregiously wrongful conduct. . ."[17], i.e. intentional tortious behavior, by its citizens.

There is no real conflict between the interests of New Jersey and those of Israel on this issue. As the New Jersey Federal District Court, sitting in diversity, and applying these New Jersey choice of law rules noted:

> At the heart of interest analysis is the realization that often the interest of only one state will be furthered by application of its law on a particular issue. This presents a "false" conflict and a court should apply the law of the only interested jurisdiction.

*Colley v. Harvey Cedars Marina et al.* 422 F. Supp. 953, 955 (D.N.J. 1976, footnote omitted). Similarly, the Appellate Division here observed:

> By the same token, we do not see how Israeli law can reasonably be regarded as offended by one of its citizens being fully vindicated in the courts of another jurisdiction. In sum, New Jersey's strong deterrent interest does not appear to collide in any appreciable way with the policy of Israeli law.

*Almog, supra* 298 N.J. Super. at 159.

---

17. *Almog v. ITAS*, 298 N.J. Super. 145, 159 (A.D. 1997).

## II. PETITIONERS HAD A FULL JURY TRIAL BELOW WHICH RESULTED IN A VERDICT, AND ALTHOUGH THE TRIAL JUDGE ELECTED NOT TO ENTER JUDGMENT ON THAT VERDICT, THE APPELLATE DIVISION REVERSED HIM AND, AFTER REVIEW, REINSTATED THE VERDICT AND DIRECTED THAT JUDGMENT BE ENTERED ON IT. PETITIONERS SUFFERED NO DENIAL OF DUE PROCESS IN THIS PROCEDURE, NOR ON THE BASIS OF ANY OF THE OTHER MATTERS RAISED IN THE PETITION.

The jury in this matter heard all the evidence, was properly charged, and rendered a verdict which to its knowledge was the only verdict in this matter. The trial judge, unbeknownst to the jury, had misgivings as to his choice of law decision during their deliberations which he expressed only to counsel, and not to the jury. After the verdict was announced, the trial judge decided not to enter judgment on the jury verdict which was based on application of New Jersey law, but rather to enter his own judgment, based on his application of Israeli law.[18] The Appellate Division, the next highest intermediate appellate court, decided that the trial court's final choice of law decision was erroneous and reinstated the jury verdict after thoroughly reviewing same. *See* discussion, *infra*, at page 17, *et seq*. The New Jersey Supreme Court, *after both sides thoroughly briefed and argued an appeal to them,* apparently concluded that petitioners did not have any appealable issue, and withdrew certification as improvidently granted, and later denied petitioners' motion for reconsideration.

Had the trial judge simply entered the jury verdict, and the Appellate Division affirmed same, the result to the petitioners, in terms of their procedural rights, or the ultimate outcome, would have been no different. Petitioners had one jury trial, a post trial revision of that verdict by the trial judge (which had the same effect as a judgment notwithstanding the verdict), an appellate review of both, resulting in the reinstatement of the jury verdict,

18. At *no* time did the jury *ever* learn of this disposition.

and a full briefing and oral argument before the highest court of the state, which only thereafter declined to upset the rulings below. The petitioners did not suffer any denial of procedural due process. The procedure did not differ in effect from any civil case where a judgment notwithstanding the verdict is ordered by a trial judge, but reversed by an appellate court, which after review elects to reinstate the original jury verdict.

The trial court did not erroneously characterize the jury as "advisory"[19] until after the jury had already been charged and sent out to commence deliberations; nor was the jury, itself, *ever* told that it would merely be acting in an "advisory" capacity.

In *Thompson v. Parks*, 963 F.2d 885 (6th Cir. 1992), the court, in reinstating the jury verdict, held that where the trial court failed to determine that the jury would be advisory until after the trial was completed, the jury verdict was valid. The court in *Bereda v. Pickering Creek Industrial Park, Inc.*, 865 F.2d 49, 53 (3rd Cir. 1989), found that ". . . as a matter of law . . .", where the trial court had not decided that the jury would act in an advisory capacity until ". . . after the verdict had been rendered . . .", the jury was then in fact not an advisory jury.

As noted by the Hon. Sylvia B. Pressler, P.J.A.D., in writing for the Appellate Division:

> . . . it was not until the jury retired to deliberate, after summations and charge, that its status as the

---

19. The trial court indicated its intent was to present the Appellate Division with *all* foreseeable options, to avoid a remand. Prior to the trial court advising that *he* would decide the matter sitting as an Israeli Judge, the defendants had already submitted their proposed *jury* charges based on *New Jersey* law and positions of the *Restatement (second) Chapter 25* (which the defendants asked the trial court to follow). *See* Pa85 *et seq.*, and Pa-116 *et seq.*, in particular. Thus, when the trial Judge explained that the punitive damage phase would be submitted to the jury to decide under the law of New Jersey, the defendants (who had three attorneys at their side, and were given 40 days advance notice) did not *then* (or at any *other* time during the remaining three days of trial) object. Raa 70-72 *et seq.*

> final arbiter was challenged. The lawyers proceeded tactically on the understanding that this was a jury trial, as did the court. Nor did the jurors have any inkling during their deliberations that their status was anything but that of ultimate finders of the facts. That was what the judge had told them, and that is how they proceeded. The same is true of the later punitive damages trial. Thus, nothing to the contrary said by the trial judge entered into or affected or tainted the way the lawyers tried the case to the jury or the way the jury deliberated. In effect, this jury never functioned or was constituted or denominated as an advisory jury. Consequently, there is no prejudice we can perceive in accepting the jury's fact-finding as the final verdict.

*Id.* 298 N.J. Super. at 160.

**Based On The Unique Facts Presented Herein, It Was Not Violative Of Due Process For The Trial Court Not To Require Individualized Determinations From The Jury As To The Liability And Damages Attributable To Each Defendant.**

Based on the unique facts presented at the trial below, individual determinations of guilt were *not* required (and would have served no purpose).[20] The defendant mother and daughter: (a) wrote every slanderous letter jointly; (b) jointly participated in every meeting where they slandered Mr. Almog; (c) jointly conducted all aspects of their business; (d) conducted every slanderous phone conversation jointly [21]; (e) even reside together;

---

20. Furthermore, defendants offer no authority (governing at the time of trial) for their proposition that when an award is made jointly and severally against defendants, the *individual* financial circumstances of each defendant must be taken into account.

21. *See, e.g.*, testimony of petitioner Shar. Raa 56[3]-57[17].

and (f) are truly inseparable. (Raa 37[13-25]). In fact, the testimony (which was largely uncontradicted, and found to be credible and overwhelming by the jury, trial judge and Appellate Division), was that *both* ladies, in *each instance*, actively participated in the defamatory statements.[22] Therefore, Judge Hague properly denied the defendants' untimely request to split them into three individual defendants for the purpose of determining liability.[23] As noted by the trial court, the entire case was presented by *one* law firm on behalf of all three defendants; they operated as one unit; and *that no information was presented to the jury by the defendants to enable it to make an allocation*; and that he did not believe that *under the circumstances* that there should be separate punitive damage awards. Nevertheless, the court *did* draft special interrogatories for the jury to decide whether there should be individual assessments or a joint award (Raa 69[13-17]; Raa 112; Raa 166[20]-168[14]). Because the *jurors found that the petitioners had indeed acted jointly*, it awarded punitive damages against the petitioners jointly.

In *Refuse & Env. Systems v. Industrial Serv. of Am.*, 932 F.2d 37, 40 (1st Cir. 1991)[24], the trial court instructed the jury that:

> (1) if the jury "found joint and several liability on the various counts, damages should be assessed jointly and severally"; and that
>
> (2) The law does not require the injured party to establish how much of the injury was done by one

---

22. *See, e.g.*, the testimony of Tommy Haendler, Pamela Cohen, Benny Sivan and Ben Ami Geller (Raa 19[7]-20[4], Raa 20[9]-21[20]; Raa 10[5]-15[6]; Raa 24[1]-34[6]).

23. Judge Hague *did* instruct the jury that they could either find the defendants individually liable or jointly and severally liable (Raa 172[10]-173[3]).

24. Which the defendants cite to (out of context) in their brief.

> person and how much . . . was done by another . . . [it] permits the injured party to treat all concerned in the injury jointly, and all are liable to respond to the plaintiff in the total sum you find to be damages.

*Id.* The First Circuit found both instructions to be proper. *Id.*

The only New Jersey "authority" to which petitioners cite, *Wilson v. Savino*, 10 N.J. 11, 89 A.2d 399 (1952), is clearly distinguishable in that *Wilson* was decided on post trial motion as to liability. The New Jersey Supreme Court specifically held therein that there was a question of fact as to whether or not each of the alleged owners was actively involved in the running of the defendant newspaper. Liability in the matter *sub judice* was decided by the jury; and the record reflects that the only evidence presented to the jury was that the two individual defendants, and their wholly owned corporation, acted in concert, in all respects.

## III. TO THE EXTENT THAT CONCEPTS OF SUBSTANTIVE DUE PROCESS UNDER THE FOURTEENTH AMENDMENT CAN HAVE ANY POSSIBLE APPLICATION TO A CIVIL TORT JUDGMENT IN STATE COURT, NO KNOWN DUE PROCESS RIGHTS OF DEFENDANTS WERE VIOLATED IN THE PROCEEDINGS BELOW.

While petitioners lead this Court to believe that the verdict was excessive and arbitrary, a review of the record clearly shows that the evidence supports the unanimous decision of the Superior Court of New Jersey, Appellate Division. Thus, the punitive damage award was not "grossly excessive" and in no way violates the Due Process Clause of the Fourteenth Amendment.

### A. Degree of Reprehensibility

Petitioners reference numerous unrelated cases in an attempt to support their argument that the punitive damage awards herein

are excessive. However, this sidetracking put forth by the petitioners simply provides no support for this Court to grant the writ.

In the case of *Filartiga v. Pena-Irala*, 577 F. Supp. 860 (E.D. N.Y.), while faced with the wholly unrelated issue of human torture, the Court, some 14 years ago, awarded a total of $10,000,000 in punitive damages (not $5,000,000 as represented by petitioners). In the matter of *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th. Cir. 1996), the Eleventh Circuit Court of Appeals, again presented with the unrelated issue of human torture, affirmed a total punitive damage award of $900,000 (not $300,000 as represented by petitioners). In citing to *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995), petitioners focus on the levying of punitive damages for the unrelated issue of human torture, and fail to mention the separate $1,000,000 compensatory and punitive damage awards based upon defamation. Finally, petitioners cite to *J.S. and M.S. v. R.T.H. and R.G.H.*, 301 N.J. 150, 693 A.2d 1191 (N.J. App. 1997), in which a punitive damage award was given based upon the unrelated issue of sexual abuse.

Petitioners claim that the compensatory damage award is greater than the combined net worth of all three defendants. As noted by Judge Pressler, ". . . we have carefully examined the evidence adduced at the punitive damages trial. Suffice it to say that the awards were commensurate with the evidence of defendants' wealth . . ."[25] The petitioners chose to refuse to comply with notices to produce highly relevant financial and business records[26] and chose *not* to present *any* expert testimony on the related issues of damages, their income, the value of ITAS, or of the individual petitioners'

---

25. *Almog* at 161.

26. Resulting in the trial court taking judicial notice that documents requested by respondents were not produced by the defendants (Raa 64[11]-65[10]). *See also* the trial court's post verdict October 1, 1993 letter ruling referring to ". . . the defendants' flagrant and cavalier violation of the Court's discovery orders concerning their financial condition . . ." and ". . . defendant's almost laughably transparent failure to produce financial information." (Pa 130).

personal holdings. As a result, the respondents had to rely upon admissions made by petitioner Ceil Shar, financial statements petitioners furnished to a bank in *1987* (obtained by subpoena) (Pa187), inconsistent factual representations as to their sales and profits made by the petitioners in a contemporaneous lawsuit of which the trial court was asked to take judicial notice (Pa73), and upon certain calculations and projections made by respondent Shalom Almog and by respondents' expert accountant at trial (Pa377, Pa401).[27] Furthermore, petitioners *refused* to take advantage of the trial court's October 1, 1993 *sua sponte offer* to petitioners to cooperate with a Court appointed accountant to assist the trial court in determining whether the jury's award of punitive damages was excessive based on petitioners' true financial situation (to be ascertained) (see Pa130, Pa137, Pa138), and informed the Court that they would *not* provide any of the financial documents requested by the court appointed accountant (Pa138).[28] At trial, petitioner Shar blithely testified to giving away hundreds of thousands of dollars to petitioner Ziemke's husband and children prior to trial.[29] Raa 162 [10]-163 [6]; Raa 164 [3-15]. As noted *supra*, the extent of the malicious injury caused by the petitioners, coupled with the petitioners' blithe indifference, if not arrogance, in refusing to make disclosure of their assets and income, were undoubtedly considered by the jury, which relied upon the competent proofs presented by the respondents. Simply stated, the petitioners did not obtain an unjust result.

---

27. *E.g.*, ITAS grosses approximately $6.1 million per year (Raa 122[21-25]; RAA 123[17]-124[9]; RAA 125[11-15]; and Pa84) and earns $1.642 million per year (Raa 126[6-20]; Raa 127[6-13]; Raa 128[8]-129[11]).

28. By letter to counsel dated February 23, 1994, the trial Judge noted that there had been a ". . . flagrant lack of cooperation. . ." by the defendants with the court appointed accountant (Pa 137).

29. On September 21, 1993, petitioner Shar testified that within the past year she gave her granddaughter $164,000; she gave her son-in-law approximately $200,000; that she gave each of her grandchildren about the same amount; and that she gave her other granddaughter $100,000 as a wedding gift three months prior to the trial (Raa 136[18]-162[21]).

**B. Ratio**

Clearly, the 3:1 ratio of punitive damages to compensatory damages which were awarded to the Almog Respondents is not "grossly excessive".

**C. Comparative Legislative Sanctions**

Petitioners refer this Court to the Punitive Damages Act enacted by the State of New Jersey (N.J. Stat. Ann 2A:15-5.9 *et seq.* (West 1998)) subsequent to the completion of the trial of this matter. While Petitioners concede that the act does not apply in this matter, Petitioners claim that the Act "illustrates the concern of the New Jersey legislature that punitive damage verdicts are often excessive and unreasonable".

However, the punitive damages award entered in favor of the Almog Respondents falls within the provided 5:1 ratio (between punitive and compensatory damages, respectively). Furthermore, said Act sets forth that the purpose is to ". . . punish the defendant and to deter that defendant from repeating such conduct . . ." (N.J. Stat. Ann. 2A:15-5.14(a)).

Indeed, at the time of the trial of this matter in 1993, the law of New Jersey was:

> The amount of punitive damages is a matter of resting in the sound discretion of the jury or other triers of the facts, since there is no established standard by which the amount of punitive damages may be fixed.

New Jersey Practice, Vol. 24 § 742, 2nd edition.

## CONCLUSION

The malicious conduct of the petitioners, as well as the extent of damages caused thereby, has been well documented. The respondents' proofs thereof have been accurately characterized by the New Jersey Appellate Division as being "overwhelming". Respondents Shalom and Irit Almog filed their suit in October 1989. Throughout 9 years of litigation, the petitioners have been the perpetrators of pre-trial, trial and post-trial discovery abuse, and bad faith litigation tactics. It is not at all surprising that they complain of the result. However, they received a fair trial. The Respondents are entitled to repose.

WHEREFORE, for all the reasons set forth herein, the petition for writ of certiorari to the Superior Court of New Jersey, Appellate Division should be denied.

Respectfully submitted,

DAVID FEINSILVER
*Counsel of Record*
THE FEINSILVER LAW GROUP, P.C.
*Attorneys for Respondents*
*Shalom Almog and Irit Almog*
215 Millburn Avenue
P.O. Box 312
Millburn, New Jersey 07041
(973) 376-4400

*On the Brief:*

DAVID FEINSILVER
JAIME R. PLACEK
DANIEL V. SOLLECITO

(4)

No. 97-1910

FILED
SEP 3 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

**In The**

# Supreme Court of the United States

**October Term, 1997**

---

MARILYN ZIEMKE, CELIA SHAR and
ISRAEL TRAVEL ADVISORY SERVICE, INC.,
*Petitioners,*

v.

SHALOM ALMOG, IRIT ALMOG,
and BEN AMI GELLER,
*Respondents.*

---

**On Petition For A Writ of Certiorari**
**To The Superior Court of New Jersey,**
**Appellate Division**

---

## REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

---

CHRISTOPHER V. LANGONE
*Counsel of Record*
THE LANGONE LAW FIRM
29 South LaSalle Street
Suite 945
Chicago, Illinois 60603
(312) 782-2000
*Attorney for Petitioners*

14pp

## TABLE OF CONTENTS

ARGUMENT IN REPLY ..... 1

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THIS COURT'S DECISION IN *DUN & BRADSTREET* LEFT OPEN IMPORTANT QUESTIONS REGARDING THE APPROPRIATENESS OF PUNITIVE DAMAGES IN A DEFAMATION CASE AND THERE EXISTS A SPLIT OF AUTHORITY ON THE ISSUE. . . 1

A. By Focusing on the Public-Concern Issue, Respondents Miss the Point; Certiorari Should Be Granted Because the *Dun & Bradstreet* Plurality Left Unanswered Important Questions Regarding the Appropriateness of Punitive Damages in a Defamation Context. ..... 1

B. Petitioners' Cases Are Not the "Minority View;" They Evidence a Split in Authority this Court Should Resolve ..... 2

II. CERTIORARI SHOULD BE GRANTED BECAUSE THE MANNER BY WHICH PETITIONERS WERE DEPRIVED OF PROCEDURAL DUE-PROCESS ESTABLISHED A DANGEROUS PRECEDENT CAPABLE OF REPETITION. ..... 4

III. THE *BMW* "EXCESSIVENESS INQUIRY" SHOULD BE LIMITED IN CASES INVOLVING INDIVIDUAL DEFENDANTS AND CASES INVOLVING SPEECH. ..... 6

A. Certiorari Should Be Granted Because in a Case Involving an *Individual* Defendant, Courts Must More Closely Review Punitive Damages For Excessiveness. . . . . 7

B. Certiorari Should Be Granted Because in a Case Involving Speech Protected by the First Amendment, the Existing *BMW* Guideposts Are of Limited Utility. . . . . 8

SUMMARY OF REASONS TO GRANT THE WRIT . . 10

## TABLE OF AUTHORITIES

*Ashton v. Kentucky*, 384 U.S. 195, (1966) ..... 10

*BMW of North America v. Gore*, 116 S.Ct. at 1589 (1996) ..... 8, 10

*Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) ..... 3, 4

*Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 760 (1985) ..... 1, 2, 8

*Food Lion, Inc. v. Capital Cities/ABC, Inc., et al.* ..... 3

*NACC v. Butt*, 371 U.S. 415 (1963) ..... 10

*RAV v. St. Paul*, 505 U.S. 377, 384 (1992) ..... 8, 9

*Stromberg v. People of the State of California*, 283 U.S. 359 (1931) ..... 10

*TXO v. Alliance Resources Corp.*, 509 U.S. 443, 500 (1993) ..... 2

*Virginia Pharmacy Bd. v. Virginia Citizens' Consumer Council, Inc.*, 425 U.S. 748, 771-72 (1976) ..... 8

## ARGUMENT IN REPLY

### I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THIS COURT'S DECISION IN *DUN & BRADSTREET* LEFT OPEN IMPORTANT QUESTIONS REGARDING THE APPROPRIATENESS OF PUNITIVE DAMAGES IN A DEFAMATION CASE AND THERE EXISTS A SPLIT OF AUTHORITY ON THE ISSUE.

#### A. By Focusing on the Public-Concern Issue, Respondents Miss the Point; Certiorari Should Be Granted Because the *Dun & Bradstreet* Plurality Left Unanswered Important Questions Regarding the Appropriateness of Punitive Damages in a Defamation Context.

Respondents hinge their opposition to certiorari on their improper articulation of the issue as "whether the defamation was about matters of public concern," and their peculiar interpretation of the three-justice plurality decision in *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 760 (1985), a decision they contend stands for the proposition that "absent public concern, there [are] *no* First Amendment limitations on the ordinary common-law concepts of libel and slander." (Gbo. at 9-13; Abo at 9-14, emphasis added.)[1] But petitioners have never claimed that the speech in this case involved matters of public concern, so they concede respondents' moot point. Nevertheless, the imposition of punitive damages still violates the First Amendment because, where actual damages can be ascertained, punitive damages — even in a private defamation case — unnecessarily chill and impermissibly punish speech.

At the heart of the *Dun & Bradstreet* plurality decision was the principle that in a *commercial speech case*, where *actual*

---

[1] "Abo." refers to Almog's Brief in Opposition; "Gbo." refers to Geller's Brief in Opposition.

*damages cannot be ascertained*, presumed and punitive damages may be permitted as a substitute. *Id* at 760 (1985).[2] A contrary holding would not have achieved the legitimate goal of compensating *reputational* harm. *Dun & Bradstreet*, however, left unresolved many important questions: (1) are punitive damages appropriate when actual damages can be ascertained; (2) are punitive damages appropriate in a non-commercial speech case;[3] and (3) is there any limit to the amount of punitive damages that can be imposed in a defamation case. The last issue is especially important given the contemporary climate of punitive damages. *Dun & Bradstreet* was decided over a decade ago, when punitive damages did not reach the colossal heights they reach today. *See TXO v. Alliance Resources Corp.*, 509 U.S. 443, 500 (1993)(O'Connor, J., dissenting) (citing empirical evidence to show how punitive damages awards have been skyrocketing in recent years). This Court should grant certiorari so that the important issues raised above may be addressed in the current climate of punitive damages.

**B. Petitioners' Cases Are Not the "Minority View;" They Evidence a Split in Authority this Court Should Resolve.**

Geller asserts that the cases cited on pages 11-12 of the

---

[2] This is consistent with the historical role of punitive damages, which were awarded to fill the gap left open by the unavailability of compensatory damages for pain, humiliation, and other forms of intangible injury. *See, Pacific Mutual Life Insurance Co. v. Haslip* 499 U.S. 1, 62 (1991)(O'Connor, J., dissenting).

[3] Respondents do not suggest that the speech involved in this case proposed a commercial transaction; accordingly they concede it is not commercial speech. *See Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973).

Petitioner's brief, holding that punitive damages in a defamation case violate the First Amendment, represent the "minority view." (Gbo. at 12.) But Geller does not cite a single case that examined the issue and held to the contrary. While Almog cites *Food Lion, Inc. v. Capital Cities/ABC, Inc., et al.*, for a contrary proposition (Abo. at 11), he fails to address the analysis underlying petitioner's cases. Instead, both respondents simply parrot the conclusory assertion that the speech in this case was "egregious." (*See e.g.*, Gbo. at 23; Abo. at 5.) Even so, efforts to deter false speech, even egregiously false speech, still impermissibly "chill" true speech. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)(the possibility protected speech may be muted outweighs the potential harm to society in permitting some unprotected speech go unpunished).[4]

Without citations or analysis from Geller, and only a single citation from Almog, respondents' assertion that petitioners' cases are the "minority view" lacks merit. This assertion only highlights the existence of a split in authority regarding the constitutionality of punitive damages in defamation cases. Respondents do not provide any reason why this split in authority should not be resolved by this Court.

---

[4] This is true not only because speakers of true speech might be afraid of an unfounded defamation suit, but also because what may be false speech in an evidentiary sense is not necessarily false speech in an epistemological sense. The accountant's report proving Almog's embezzlement provides an example. Respondents contend the report was not produced at trial. (Abo. at 2, n. 3; Gbo. at 3.) This is false. But because this evidentiary dispute does not demand the intervention of this Court, petitioners will concede the report was not admitted into evidence. This does not, however, mean the report does not exist; the truth of speech does not depend on whether it is admitted into evidence at a New Jersey trial.

## II. CERTIORARI SHOULD BE GRANTED BECAUSE THE MANNER BY WHICH PETITIONERS WERE DEPRIVED OF PROCEDURAL DUE-PROCESS ESTABLISHED A DANGEROUS PRECEDENT CAPABLE OF REPETITION.

Modern judicial systems employ procedural safeguards to ensure litigants the rights guaranteed them by the Due Process Clause of the Fourteenth Amendment: "[1] careful instructions direct the juries' deliberations, [2] trial judges diligently supervise proceedings, watchful for potential sources of error and [3] appellate courts stand ready to overturn judgments when efforts to ensure fairness have failed." *TXO*, 509 U.S. 443, 474 (1993)(O'Connor, J., dissenting). A court's "duty to interfere with a disproportionate jury verdict is absolutely necessary to the safe administration of justice, and ought, in all proper cases, be asserted and exercised." *Id.* at 477. Unfortunately, by entirely abdicating their judicial obligations, and abandoning all three procedural safeguards, the state courts of New Jersey have foisted the "duty to interfere" on this Court.

Respondents do not adequately address petitioners' argument that the lump-and-dump instructions used in this case were not the "careful instructions" required by due process. First, respondents assert that petitioners did not object to the improper jury instructions. Respondents are wrong. (*See*, Pet. at 5, citing Da 461-467, Tr. 8/13/93, p.m. at 60-69; Tr. 9/21/93, pp. 59-62.) Then, respondents claim the lumping together was permissible because petitioners conspired to commit slander. (Gbo. at 17-20; Abo. at 22-24.) But the jury never made a finding of conspiracy, nor was a conspiracy interrogatory ever tendered. Finally, respondents ignore the impropriety of lumping petitioners together during the punitive damages phase. Due process requires individual determinations of guilt.

Not only did the trial judge overlook this "potential source of error," but as Geller acknowledges, the trial judge stated he would "attend to other judicial tasks while trial testimony was being provided." (Gbo. at 7.) This is hardly the "diligent[] supervis[ion] of [the] proceedings" referenced in *TXO*.[5]

Finally, the New Jersey appellate courts did not "stand ready to overturn judgments." For instance, citing court-backlog and a fear of a new trial, the appellate division was content to excuse the trial judge's conduct as a "procedural lapse." (App. 8, 15.) And since the New Jersey Supreme Court withdrew certification, petitioners were completely denied any review of the punitive awards. After March 1997, when the jury's verdicts first became operative, the punitive damage awards have not been reviewed by any court.

The lack of review was the result of the novel and unprecedented use of what has been termed "advisory jury verdict." As a result of this procedure, petitioners did not know whether they should actively participate in the punitive-damages phase of the trial when any verdict rendered by the "advisory" jury would not be operative and the bench verdict did not contain any punitive damages. Additionally, petitioners were prejudiced on appeal because they did not know whether, or how, the damages awarded by the "advisory" jury should be addressed on appeal, including the applicable standard of review and the manner in which issues relating to the

---

[5] In a remarkable feat of rationalization, Geller suggests that by his inattentiveness, the trial judge merely reaffirmed the importance of the jury as the "most important function of the process." (Gbo. at 7.) But as this Court has noted, adequate review is the most important function of the process. *Honda Motor Co., Ltd., v. Oberg*, 512 U.S. 415, 420-21 (1994).

"advisory" jury's awards should be preserved for appeal.[6] For these reasons, the procedure sets a dangerous precedent with the potential to deprive future litigants of their due process rights. In any situation where there is doubt as to an issue, the judge may simply decide to institute procedures under which the case will be decided on both sides of the issue, with an invitation to the appellate court to pick the correct alternative.

## III. THE *BMW* "EXCESSIVENESS INQUIRY" SHOULD BE LIMITED IN CASES INVOLVING INDIVIDUAL DEFENDANTS AND CASES INVOLVING SPEECH.

### A. Certiorari Should Be Granted Because in a Case Involving an *Individual* Defendant, Courts Must More Closely Review Punitive Damages For Excessiveness.

The four cases within which this Court developed procedural and substantive standards to control punitive

---

[6] Petitioners preserved their arguments as best they could under the circumstances. In both their motion for a new trial and in their brief to the appellate division, petitioners argued that the damages awarded by the bench verdict were excessive. In conjunction with this argument, petitioners noted that a similar excessiveness analysis could apply to the non-operative jury verdicts, but there was no reason to elaborate because the "advisory" verdicts were of no legal effect. Petitioners raised the First Amendment issue at their first opportunity: after the bench verdict was reversed and the "advisory" jury verdict was rendered operative. Prior to that time, the "advisory" jury's punitive awards were not at issue, nor was the First Amendment. Respondents' argument that petitioners waived the right to object to the excessiveness of the "advisory" jury's punitive award underscores the lack of procedural safeguards in this case. The very basis of respondents' waiver argument arises from the procedural failings for which petitioners seek review.

damages all involved corporations (Pacific Mutual, TXO, Honda and BMW), not individuals. While the ultimate refinement of the "excessiveness inquires," as set forth in *BMW*, may be workable when applied to a corporate defendant, individuals require qualitatively greater protection from excessive punitive verdicts. Because this Court has never examined the application of punitive damages to individuals, and because the concerns regarding "grossly excessive" and arbitrary awards are just as important– if not more important– in that context, this case is ripe for review.

Unlike corporations, individuals do not benefit from the limited liability afforded by the corporate form and can lose all of their assets by virtue of one annihilating punitive award. This distinction is crucial because, in a corporate setting, assets are more fungible and are not bound up with a person's sense of identity. *See*, Margaret Jane Radin, Property and Personhood, 34 Stan. L. Rev. 957, 959-60, 978-79, 986-87 (1982) (some property, such as one's home, are central to personhood and deserve more protection that purely fungible goods). As petitioners stressed in their opening brief, in this case the defendants livelihood and very existence is at stake. (Pet. at 7.) Respondents ignore this underlying distinction.

Moreover, because corporations are fundamentally motivated by profit, which is unlikely to be deterred by incidental state regulation, *Virginia Pharmacy Bd. v. Virginia Citizens' Consumer Council, Inc.*, 425 U.S. 748, 771-72 (1976), punitive damages serve a more important function when applied to a corporation. *See, Dun & Bradstreet*, 472 U.S. at 748. But with individuals, whose actions are often motivated by feelings and ideals and not necessarily profit, this rationale does not apply. Individuals tend to shape their conduct based on regulations and social mores, not civil damage awards. An especially important corollary to this point

is that individuals, unlike corporations, can be subjected to criminal liability for their wrongdoing. Consequently, punishment through money damages is not as necessary to control, deter or punish wrongful conduct in a case involving individuals.

**B. Certiorari Should Be Granted Because in a Case Involving Speech Protected by the First Amendment, the Existing *BMW* Guideposts Are of Limited Utility.**

When this Court decided *BMW*, it articulated three guideposts to be used in deciding whether a punitive damages award is "grossly excessive." *See. BMW*, 116 S.Ct. at 1598. While these guideposts can be employed in a wide spectrum of cases, they are of limited utility in a case involving speech.

For instance, the First Amendment entirely precludes utilization of the "reprehensibility" guidepost. To punish speakers more severely because their speech – even their defamatory speech – is "reprehensible," necessarily entails making the kind of content-based judgments held unconstitutional in *RAV v. St. Paul*, 505 U.S. 377, 384 (1992). To paraphrase that case, "the power to prescribe particular speech . . . on the basis of one content element," (*e.g.*, it is defamatory), "does not entail the power to proscribe the basis of the other content elements," (*e.g.*, it is "especially egregious" defamation).[7] This is because what is, or is not, "reprehensible" defamation requires making normative judgments about the idea expressed. So while, "false statement of fact" is neutral enough to support exclusion of the class of

---

[7] Or, as the *RAV* court stated, "the government may proscribe libel, but it may not make the further content discrimination of proscribing only libel critical of the government" *Id.* at 384.

defamatory speech from full First Amendment protection,[8] "reprehensibility" is not "neutral enough to form the basis of distinction within the class." *Id.* at 388. Speech can be regulated based on the harm it causes (*e.g.* fighting words), or the risks it poses to human life (*e.g.*, "fire" in a theater), but not on its level of "reprehensibility." This is why petitioners focus on harm to others as the comparative gauge to measure degree of reprehensibility.

Almog correctly observes that the torture cases cited by petitioners in their opening brief are not wholly related to a defamation action.[9] (Abo. at 24.) Petitioners utilized this approach to demonstrate the types of conduct that are truly reprehensible for which large punitive damage awards have been allowed. Conduct is considered less reprehensible if it does not involve threats to the health and safety of others and is non-violent. *BMW*, 116 S.Ct. at 1599, and, therefore, a comparison of cases involving torture and sexual abuse of children is at least somewhat illuminating.

Similarly, while legislative sanctions on commercial speech have been upheld, legislative sanctions imposing civil or criminal liabilities on non-commercial speech are rarely upheld. Since all parties agree that the speech involved in this case does not meet the definition of commercial speech, the speech involved here is not the type of speech that can be easily

---

[8] As noted in *RAV*, even defamation is not a "category of speech entirely invisible to the Constitution." *Id.* at 383.

[9] Almog wrongly accuses petitioners of misstating the amount of punitive damages awarded in the torture cases. (Abo. at 25.) In discussing those cases, however, petitioners cited the amount awarded to each individual plaintiff, not the total amount received by all plaintiffs; therefore, no misrepresentation has occurred.

regulated by a legislative body. Therefore, "comparative legislative sanctions" has limited, if any, utility.

This leaves ratio. This Court has eschewed an approach that focuses solely on the ratio between actual and punitive damages. *TXO*, 509 U.S. at 460. But in a speech case, ratio is the only guidepost that has any utility. So, to the extent punitive damages will still to be permitted in a defamation case, the *BMW* test needs to be limited in matters involving speech. Many existing tests have been altered, or applied more rigorously in a speech context. *See e.g., Stromberg v. People of the State of California*, 283 U.S. 359 (1931); *Ashton v. Kentucky*, 384 U.S. 195, (1966). The *BMW* test is no exception.

## SUMMARY OF REASONS TO GRANT THE WRIT

[1] In *Dun & Bradstreet*, this Court left open the issue of whether punitive damages in a defamation case violate the First Amendment when actual damages are clearly ascertainable. A conflict among state courts exists on this issue as well. Given the current climate of "punitive damages run wild," they pose an especially dangerous threat to free speech. Accordingly, this is an opportune time for this Court to grant certiorari and examine this important constitutional issue.

[2] In this case, traditional procedural safeguards have been so dramatically deformed that they threaten to infect the procedural integrity of the judicial system. Petitioners urge this Court to exercise its supervisory authority, grant certiorari, and reverse this dangerous assault on due process.

[3] While this Court has recently examined the due process implications of punitive damages in a corporate context, it has not done so in a case involving individuals, nor in a case involving speech rights. These features justify certiorari in this case because the *BMW* test is not workable in such contexts.

Respectfully submitted,
*Christopher V. Langone*
ATTORNEY FOR PETITIONERS